IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1962

No. [illegible]

CHARLES PAUL [illegible], Director of Agriculture of the State of California, and STANLEY MOSK, Attorney General of the State of California,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

BRIEF FOR APPELLANTS

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 19

CHARLES PAUL, Director of Agriculture of the State of California and STANLEY MOSK, Attorney General, State of California,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

BRIEF FOR APPELLANTS

OPINION BELOW

The opinion and findings of the District Court for the Northern District of California, Southern Division, are reported in 190 F. Supp. 645. By order dated March 27, 1961, this memorandum opinion was adopted

as sufficient to constitute the findings of fact and conclusions of law in the action. R. 648.

JURISDICTION

These suits were brought under 28 U.S.C. 1331 and 1345 to enjoin the enforcement of the California milk stabilization act (Ch. 17, Div. 6, Calif. Agr. Code) as unconstitutional as (1) imposing a prohibition on the federal procurement function and (2) as applied to contractors making delivery of milk to areas subject to exclusive federal jurisdictions. R. 7-13, 178-183, 191-196. The trial court granted the relief requested and permanent injunctions of the three-judge district court were entered on April 19, 1961. R. 6, 166. Notice of appeal to this Court was filed in the district court on April 26, 1961. R. 6, 166, 669-672. By order entered June 7, 1961, the district court extended appellant state officers'[1] time for docketing the appeals and filing the record on appeal with the Clerk of the United States Supreme Court to July 24, 1961. Appendix p. 159. State officers' Jurisdictional Statement and the record on appeal were docketed with the clerk of this Court on July 19, 1961. The Court by order entered January 15, 1962, postponed consideration of the question of jurisdiction until a hearing of the cause on the merits. 368 U.S. 965. The order also requested that counsel brief and argue, in addition to the merits, the

[1] Appellants are Charles Paul, Director of Agriculture, and Stanley Mosk, Attorney General of California, cited herein as "state officers."

question of the Court's jurisdiction on direct appeal under 28 U.S.C. 1253. 368 U.S. 965 (1962).

Jurisdiction of the Court on direct appeal under 28 U.S.C. 1253 hinges on whether the government's complaint required the convening of a three-judge district court under 28 U.S.C. 2281. *Florida Lime Growers* v. *Jacobsen*, 362 U.S. 73, 75 (1960); see *Ex parte Hobbs*, 280 U.S. 168, 172 (1929). A three-judge district court is to be convened under 28 U.S.C. 2281 (formerly Judicial Code, Sec. 266, 36 Stat. 1162) only if an injunction is sought restraining the enforcement of a state statute "upon the ground of the unconstitutionality of such statute." This phrase requires that there must be ". . . an asserted conflict with the Federal Constitution . . . ." *Louis. & Nash. R.R. Co.* v. *Garrett*, 231 U.S. 298, 304 (1913). See *Ex parte Bransford*, 310 U.S. 354, 361 (1940). A case in which the complaint seeks to enjoin enforcement of a state statute on substantial grounds of federal unconstitutionality is one required to be heard by a district court of three judges, even though nonconstitutional grounds of attack upon the statute are also alleged in the complaint. *Florida Lime Growers* v. *Jacobsen*, 362 U.S. 73 (1960).

The government's complaints in the court below sought on two grounds to enjoin enforcement of the California milk stabilization act as applied to milk delivered on three federal military installations. First, the government alleged in its complaint in action No. 39030 that the state milk stabilization laws, as applied

to contractors delivering milk to the Oakland Army Terminal, were unconstitutional "in that they place an unreasonable and unconstitutional burden and impediment to the United States in the discharge of its constitutional powers and responsibilities under Article I, Section 8, Clauses 11 through 17, inclusive; Article II, Section 2, Clause 1; and Article IV, Section 3, Clause 2, of the Constitution of the United States." R. 8. Virtually the same word for word allegation of unconstitutionality of the state milk laws is alleged in the government's complaint in action No. 39073 with respect to milk delivered to Castle and Travis Air Force Bases. R. 178, 191. These assertions of conflict between the state milk stabilization act and the war and supremacy clauses of the federal Constitution assert the "unconstitutionality" of the state law within 28 U.S.C. 2281, just as the allegation in the government's complaint in *Query* v. *United States*, 316 U.S. 486 (1942) that enforcement of a South Carolina excise tax to Army Post Exchanges in their sales of tobacco, playing cards, soft drinks and similar items would be "contrary and repugnant to the provisions of the Constitution of the United States and in interference with the activities of the United States Government . . ." asserted the "unconstitutionality" of the state statute under former Judicial Code Section 266. *Query* v. *United States*, 316 U.S. 486, 487 (1942); Transcript of Record, *Query* v. *United States*, Supreme Court of the United States, October Term 1941, No. 619, pp. 3-4.

[2] Constitution Article I, Section 8, clauses 3; 11-16

The government's allegations of unconstitutionality in their complaints in the instant causes are virtually the same as the allegations in the government's complaint in *Calif. Comm'n. v. United States*, 355 U.S. 534 (1958). In the *Calif. Comm'n.* complaint, the government alleged that California Public Utilities Code, Section 530, placed "an unreasonable burden and impediment on the United States in the discharge of its constitutional powers and responsibilities under Article I, Section 8, clauses 7, 12, 13, 16, 17, and Article IV, Section 3, Clause 2, of the Constitution of the United States." Transcript of Record, *Calif. Comm'n. v. United States*, Supreme Court of the United States, October Term 1957, No. 23, pp. 6-7. Without discussion, the Court held that the complaint raised an issue of unconstitutionality under 28 U.S.C. 2281 which gave the court appellate jurisdiction over the direct appeal. *Calif. Comm'n. v. United States*, 355 U.S. 534, 536 (1958).

In *Penn Dairies, Inc. v. Milk Control Comm'n.*, 318 U.S. 261 (1943), the appellant United States took the position that the Pennsylvania wholesale milk price regulations were unconstitutional arguing:

> "But even if we assume that the state price regulation is formally addressed to the milk dealer alone, nevertheless direct interference with the federal function is its inescapable legal concomitant." Brief For The Appellants, *Penn. Dairies, Inc. v. Milk Control Comm'n.*, Supreme Court of the United States, October Term, 1942, No. 399, pp. 13-14.

Mr. Chief Justice Stone at the outset of his opinion for the Court stated: "Decision of this case turns on the question whether the minimum price regulations of the Pennsylvania Milk Control Law . . . may constitutionally be applied to the sale of milk by a dealer to the United States. . . ." 318 U.S. 261, 266. The constitutional issue mentioned by Mr. Chief Justice Stone was the government's argument that the state law unconstitutionally impaired a federal function, that is, procurement. This constitutional issue, then, gave the Court appellate jurisdiction of the direct appeal from the Supreme Court of Pennsylvania under Judicial Code, Section 237, now 28 U.S.C. 1257(2). 318 U.S. 261, 268. The phrase "repugnant to the Constitution" in Judicial Code, Section 237, 36 Stat. 1156, is equivalent, under the issues posed here, to the words "unconstitutionality of such statute" in 28 U.S.C. 2281, the controlling appellate jurisdiction statute in this case. The same constitutional issue concerning a similar state milk control statute was before the Court in *Penn Dairies*, and as in that case, the Court has appellate jurisdiction of the appeal in this case.

The government's claim in this case that the state statute constituted an unconstitutional interference with a federal function was pressed in the trial court, the government arguing: "That by enforcement of the California minimum milk price statute defendants are attempting to interfere with a federal function . . . and that such attempted interference is prohib-

ited by the Supremacy Clause of the United States Constitution (Article VI, clause 2)." R. 169. The district court found that a constitutional issue was posed by the government's position that enforcement of the state statute "violates the right of the plaintiff to be free from state interference in the exercise of a federal function under the Supremacy Clause, Art. VI, clause 2, of the United States Constitution." 190 F. Supp. 645, 648.

In its memorandum in response to Jurisdictional Statement, filed in this Court, the government stated that it will argue in its brief on the merits ". . . that the California milk act is unconstitutional insofar as it compulsorily applies to distributor sales to the federal government because it prohibits, on threat of criminal and civil penalties, federal procurement officers from purchasing milk at less than the state-established minimums under the Armed Services Procurement Act and regulations issued thereunder." (Gov't. Br., 6, fn. 5.) Therefore, a case is presented "in which the injunction may be granted on grounds of federal unconstitutionality" so that the case comes within the three-judge requirements of 28 U.S.C. 2281. *Florida Lime Growers* v. *Jacobsen*, 362 U.S. 73, 76-77 (1960). The provisions of the Pennsylvania milk stabilization act, similar to California's statute, were held in *Penn Dairies, Inc.* v. *Milk Control Comm'n.*, 318 U.S. 261, to be compatible with the policy expressed in the federal procurement statutes. These procurement statutes, although codified into 10 U.S.C. 2301

et seq., remain in effect today. The Supreme Court of California has held that California's milk stabilization act, like the similar acts of Pennsylvania and Massachusetts, does not apply to the United States or its instrumentalities. *Pacific Coast Dairy* v. *Dept.*, 19 C. 2d 818, 830, rev'd. on another ground, 318 U.S. 285; *Penn Dairies, Inc.* v. *Milk Control Comm'n.*, 344 Pa. 635, 26 A. 2d 441, 445, affirmed 318 U.S. 261; *Milk Control Board* v. *Gorselini Dairies, Inc.*, 301 Mass. 174, 16 N.E. 2d 641; 643. Therefore, no substantial question of statutory interpretation is presented on the procurement policy issue in the case, which instead poses the immediate constitutional issue whether the state's milk stabilization act is valid under the Supremacy Clause of the Constitution. *Kesler* v. *Department of Public Safety*, 369 U.S. 153 (1962). The convening of the three-judge court under these circumstances, followed the familiar pattern of such cases as *Calif. Comm'n.* v. *United States*, 355 U.S. 534 (1958); *Query* v. *United States*, 316 U.S. 486 (1942), and *James* v. *Dravo Contracting Co.*, 302 U.S. 134 (1937), where state statutes were challenged as an unconstitutional interference with a federal function. This Court, therefore, has appellate jurisdiction of the case under 28 U.S.C. 1253.

For a second ground of unconstitutionality, the government alleged in their complaints that state officers "are precluded by the Federal Constitution from regulating prices of milk sales to the United

States where the sales and deliveries are made in an area subject to the exclusive jurisdiction of the United States." R. 7, 178, 191. This claim of unconstitutionality, as understood by state officers, is based on two propositions: First, the government asserts that a state statute (Calif. Gov. Code, Sec. 111, formerly Political Code, Sec. 34) which is not in the form of a cession of jurisdiction, but which consented to the federal purchase of land for military purposes, has the same legal effect as a state statute which makes an express cession of jurisdiction. Second, if not, then Government Code, Section 111, granted state consent to the exercise by Congress of the power to exercise exclusive legislation over the land so purchased under Constitution Article I, Section 8, clause 17. And it is asserted, this power in Congress to exercise exclusive legislation is *per se* exclusory of state law, even where Congress has not exercised this power.

State officers in their answers and briefs, disagree with the first proposition since a state consent to the purchase of land for military purposes by the United States, without an express cession of jurisdiction, does not constitute a surrender of state sovereignty over the land. R. 156, 183, 197, 657, 661. *Wilson v. Cook*, 327 U.S. 474, 486 (1946). State statutes which have been held to bring land within exclusive federal jurisdiction were statutes which made express cessions of jurisdiction. *Fort Leavenworth R.R. Co. v. Lowe*, 114 U.S. 525, 528 (1885); *Surplus Trading Co. v. Cook*, 281 U.S. 647, 657 (1930); *United States v. Un-*

cuta, 281 U.S. 138, 141 (1930). Political Code, section 34 (Government Code, section 111), is not cast in the form of a cession, and, therefore, does not make a cession of exclusive jurisdiction. Secondly, state officers assert that clause 17 is not *per se* exclusory of state laws regulating local matters except as this power is implemented by Congress. *James* v. *Dravo Contracting Co.*, 302 U.S. 134 (1937).

Thus, the immediate constitutional issue posed by the government is whether a state consent statute which is not in the form of a cession was effective to transfer exclusive jurisdiction to the United States by virtue of Constitution Article I, Section 8, clause 17.

In summary, the government's complaints sought injunctions against enforcement of the California statute on grounds of federal unconstitutionality under the War and Supremacy clauses and under Article I, Section 8, clause 17 of the Constitution. These allegations required the convening of a three-judge district court under 28 U.S.C. 2281, and this Court has jurisdiction of these direct appeals under 28 U.S.C. 1253. *Florida Lime Growers* v. *Jacobsen*, 362 U.S. 73, 74-75 (1960); *Calif. Comm'n.* v. *United States*, 355 U.S. 534, 536 (1958); *Query* v. *United States*, 316 U.S. 486 (1942); *Pacific Coast Dairy* v. *Dept.*, 318 U.S. 285, 295 (1943).

QUESTIONS PRESENTED

1. Delivery of fresh milk is made to three military installations in California principally for resale

through commissaries, post exchanges, officers' and non-commissioned officers' clubs (70%) and partially for troop ration (30%). Does the enforcement of the California milk stabilization act against producers and distributors, with respect to milk purchased by distributors from milk producers and then delivered by such distributors to the three military installations, constitute an unconstitutional interference with the performance of a governmental procurement function exercised under the federal procurement statutes 10 U.S.C. 2301 et seq.?

2. California by statute in 1872 consented to the purchase or condemnation of land by the United States for military purposes and in 1897 tendered "to the United States exclusive jurisdiction over all lands . . . now held, occupied, or reserved by the Government of the United States for military purposes or defense, or which may thereafter be ceded or conveyed to said United States for such purposes; provided, that a sufficient description by metes and bounds and a map or plat of such lands be filed in the proper office of record in the county in which the lands are situated." (Sec. 34, Pol. Code; Stats. 1897, Ch. 56, p. 51 [Calif. Gov. Code, Secs. 111, 114].) Did the United States obtain exclusive jurisdiction over the parcels at Travis Air Force Base and over a civilian housing tract at Castle Air Force Base where the United States failed to file metes and bounds descriptions and plats for the parcels at Travis and Castle in the appropriate county recording office?

3. The United States Secretary of the Army gave written notice that the Department of the Army "hereby assents to the acceptance of federal jurisdiction" over certain parcels at the Oakland Army Terminal "upon and subject to each and all of the conditions and reservations prescribed in said California Government Code section 126. . . ." At the time of such notice, section 126 Government Code, reserved various state powers "in addition to any other conditions or reservations prescribed by law." At the time of such notice, Section 113 Government Code reserved "the administration of the criminal law of the state with respect to any land over which any jurisdiction . . . may be ceded or conveyed to the United States. . . ." Did California make a cession of exclusive jurisdiction over these parcels at Oakland to the United States?

4. Did the district court err in permanently enjoining enforcement of the California milk stabilization act as unconstitutional without trial and on motions for preliminary injunction (Action No. 39030) and for summary judgment (Action No. 39073), where the pleadings and affidavits raised issues of material facts?

5. Did the district court err in failing to abstain from final decision pending construction by the California Supreme Court of the California milk stabilization act and the California statutes relating to the

acquisition of land and jurisdiction by the United States, and in enjoining appellant state officers from proceeding in pending state court actions?

STATUTES INVOLVED

UNITED STATES:

Constitution of the United States, Article 1, Section 8, clause 17; 10 United States Code, sections 2301-2314; Lanham Act, 54 Stat. 1125; Section 355, Revised Statutes of the United States, as amended, Act of October 9, 1940, 54 Stat. 1083.

CALIFORNIA:

Agricultural Code, Chapter 17, Division 6; Government Code, sections 111, 113, 114, 126; Political Code, section 34, as amended Stats. 1939, Ch. 710, p. 2231; Statutes of 1897, Chapter 56, p. 51.

Copies of relevant portions of these statutes are set forth in the Appendix at pages 160 and 176.

STATEMENT

I. THE LITIGATION BELOW

This is an appeal by the Director of Agriculture and the Attorney General of California (appellants) from the judgments (R. 666, 668) of a three-judge district court entered on motion for summary judgment (District Court No. 39073) and for preliminary injunction (District Court No. 39030) which found that the California milk stabilization act was unconstitutional as applied, and which permanently enjoined appellants from enforcing in pending state court actions the state minimum milk producer and minimum

wholesale price regulations with respect to milk purchased by distributors from milk producers and then delivered by the distributors to officers' clubs, post exchanges, commissaries and mess halls located at three military installations located in California.[3] R. 150, 550, 655-656, 790. Appellants in the trial court had filed timely objections to the motions for summary judgment and for preliminary injunction (R. 341-495; 355-356, 554-556), and had requested a stay in order to obtain a pre-trial discovery and that the case be tried on the merits. R. 341-342, 524-525, 554-556, 584. The request was denied and all evidence was presented in summary fashion through affidavits. 190 F. Supp. 645, 659-660. Appellees' motions for summary judgment in action No. 39073 were filed April 14, 1960 (Count I, Travis; R. 167) and on April 18, 1960 (Count II, Castle; R. 208). Appellees' motion for preliminary injunction in action No. 39030 (Oakland) was filed March 30, 1960. R. 15. Oral argument on the motions in both actions were heard on April 26, 1960 and were on that date ordered submitted for decision. R. 2, 162.

The trial court found that exclusive jurisdiction had passed to the United States over the 18.36 acre civilian housing tract at Castle, and over all the parcels at Travis, on the ground that the California Legislature by giving consent to the federal "purchase or condemnation" of land within the State for military purposes, had thereby ceded exclusive jurisdiction

[3] Castle Air Force Base (Castle), Travis Air Force Base (Travis) and Oakland Army Terminal (Oakland).

to the United States. 190 F. Supp. 645, 652-653. Government Code, section 111, formerly 1872 Calif. Political Code, section 34.[4]

The district court also found that the California State Lands Commission by consenting "to the acquisition by the United States of land within this State" had ceded exclusive jurisdiction to certain parcels of land at Oakland by construing the reservations of state, civil and criminal jurisdiction set forth in sections 113 and 126, California Government Code, to be inapplicable. 190 F. Supp. 645, 649-652. By reason of its conclusion that Travis and Oakland, and one parcel at Castle, lie within exclusive federal jurisdiction, the district court held the state minimum milk producer price regulations and the state minimum wholesale price regulations were unconstitutional as applied to producers and distributors with respect to milk delivered to the three installations. 190 F. Supp. 645, 660.

As an alternative ground for its decision, the trial court found that application of the state minimum milk price regulations to producers and distributors with respect to milk delivered to Castle, Travis and Oakland, would unconstitutionally impair a federal function "because the California Milk Stabilization Act 'places a prohibition on the Federal Government' within the meaning of the Public Utilities case, . . . and, therefore, it conflicts with federal procurement

[4] Government Code, section 111, and 1872 Political Code, section 34, as amended by Stats. 1939, Ch. 710, p. 2231, are set forth in the appendix at pp. 203, 204.

statutes and policy as to be invalid under the Supremacy Clause, Art. VI, Sec. 2." 190 F. Supp. 645, 647.

The California milk stabilization act, Calif. Agr. Code, Div. 6, Ch. 17, was enacted in 1935 to eliminate economic disturbances and unfair trade practices in the milk industry which threaten both the quality and adequacy of the supply of milk. Stats. 1935, Ch. 241, p. 922, as amended Stats. 1937, Ch. 3, p. 42; Stats. 1937, Ch. 413, p. 1342, and Stats. 1937, Ch. 710, p. 1988. Pursuant to this act, the Director has established (1) minimum producer prices at which dairy farmers may sell and distributors may purchase milk, and (2) minimum wholesale prices at which distributors may sell milk. R. 393-468.

Prior to December 1, 1960, California milk producers were receiving, as required by state law, the state established minimum milk producer prices for milk sold to distributors. R. 655-656, 683. In disregard of state law, certain milk producers marketed their milk through three distributors who processed and delivered the milk to federal commissary stores, officers' clubs and to troop messes at prices below the state established minimums. R. 517-523, 769-788. For example, Milk Producers Association of Central California, a California corporation (R. 151, 746, 791), underpaid dairy farmers the amount of $1,099,139.00 for the period December, 1958 to February, 1960. R. 518. Approximately 35% of this underpayment was due to low returns from sales to the United States. R. 519-520.

In early 1960 appellants filed actions against these three milk distributors, charging that milk producers had not been paid the minimum milk producer prices (R. 744, 756, 769) and that sales had been made by such distributors at prices below the established wholesale minimum prices. R. 150, 550, 792-793. The United States then brought the present actions in the United States District Court for the Northern District of California, Southern Division, to restrain the Director of Agriculture and Attorney General of California from enforcing in these state proceedings either the minimum milk producer price regulations, or the minimum wholesale milk price regulations against distributors delivering milk to the Castle, Travis and Oakland commissary officers. R. 7-12, 178-183, 194-196. The same distributor, Milk Producers Association of Central California, then held the milk contracts for all three bases. R. 27, 173, 244. Out of nine bidders at Castle, this distributor was the only one offering to deliver milk at prices below the state established minimums. R. 246. At the time the government's complaints were filed, Milk Producers Association of Central California was delivering milk to Travis at the allowed minimum wholesale milk price, less the 12¢ price discount allowed for volume sales to state and federal installations, and was delivering to Castle and Oakland at a lesser price than the state fixed minimum wholesale price, less discount. R. 27, 174, 246.

A break in the prices paid by California distributors to milk producers for milk purchased for processing and sold to federal agencies occurred, immediately after the memorandum decision holding the state act unconstitutional as applied was entered by the trial court on November 29, 1960. R. 558. This drop in price was from the state minimum milk producer price of $5.19 per hundred weight for 3.5% milkfat milk to $2.75 per hundred weight, a price below the costs of production. R 683-685. This latter price is well below the federal Department of Agriculture support price of $3.40 per hundred weight for 3.8% milkfat milk utilized for milk by-products. R. 684; 26 F.R. 2822, as amended 26 F.R. 7255. This loss to the California dairy farmer, when projected on annual federal purchases of 29,057,000 gallons (R. 348), amounted to not less than $6,900,000.00. R. 684. Milk purchased for resale through commissaries, constitutes the bulk of all milk purchased at the Castle, Travis and Oakland reservations. R. 543, 544, 545, 547, 548, 549, 643, 645, 646. The percentages purchased for such resale were respectively 73%, 64.5% and 78%. R. 643, 645, 646. These commissaries are required to operate without expense to the government. Sec. 613, 1959 Department of Defense Appropriation Act, 72 Stat. 711, 725; Sec. 613, Department of Defense Appropriation Act, 1960, 73 Stat. 366, 380; Sec. 513, Department of Defense Appropriation Act, 1961, 74 Stat. 338, 351; Sec. 613, Department of Defense Appropriation Act, 1962, 75 Stat. 365, 377. R. 634. The principal beneficiaries of the

break in prices to milk producers occasioned by the decision of the trial court were therefore the patrons of the commissary stores who were able to purchase milk at about one-half the price charged at nearby competing private retail stores, e.g. .22 v. .46½ per ½ gal. R. 420; 635, 687.

II. PARCEL ACQUISITION AND PROCUREMENT HISTORY FOR THE CASTLE, TRAVIS AND OAKLAND INSTALLATIONS.

A. Introduction.

The purchases of milk for resale at the commissaries and for troop ration at Castle, Travis and Oakland are made with appropriated funds and are governed by the armed services procurement statutes, 10 U.S.C. 2301-2314. R. 634, 643, 644, 646. Under an agreement between the Commodity Credit Corporation and the United States Army Quartermaster Corps, acting for all military agencies, the Commodity Credit Corporation pays 8.12c per quart towards the cost of milk issued for troop ration in excess of the 8 ounce ration. United States Dept. of Agriculture bulletin 2179-61, July 12, 1961.[5] These payments are paid from appropriations augmenting the Agricultural Act of 1949, 63 Stat. 1051, as amended by the Agricultural Act of 1954, 68 Stat. 897, 900.

On the other hand, the purchases of milk for resale at the post exchanges, officers' clubs, non-commissioned officers' open messes and post restaurants are made

[5] U.S. Dept. of Agr. bulletin 2179-61, July 12, 1961, is set out in the appendix at p. 219.

from non-appropriated funds (see Sec. 623, National Military Establishment Appropriation Act, 1950, 63 Stat. 987, 1022; R. 643, 645, 647), and are not governed by the armed services procurement statute, 10 U.S.C. 2303(a). The operations of these military post exchanges, officers' clubs, non-commissioned officers' open messes and post restaurants, when located on military installations, are governed by administrative regulation of the defense departments. See Sec. 20, Act of July 15, 1870, 16 Stat. 315, 319; *Standard Oil Co.* v. *Johnson*, 316 U.S. 481, 483 (1942); *Johnson* v. *Yellow Cab Co.*, 321 U.S. 383, 393 (1944).

B. Castle Air Force Base.

Castle Air Force Base, totaling 2,376 acres in area, is located in Merced County, California. R 380, 383-387. The base proper was successively acquired by the purchase and condemnation of separate parcels of land from private land owners between June 20, 1946 to June 11, 1956 (R. 352, 383-387), excepting the parcel of 18.36 acres located outside the main entrance gate to Castle which was acquired for civilian housing purposes on July 17, 1943. R. 349, 385. This parcel was acquired pursuant to the Lanham Act, 54 Stat. 1125, which expressly provides that federal acquisition of land under the statute should not deprive a state of jurisdiction over such land. R. 229, 233, 381.

Bid invitations for milk to be purchased with appropriated funds originate from the Base Procure-

ment Office (R. 244) to persons on a "bidders list." R. 248. Bid proposals are then returned by bidders to the procurement office. R. 248. The contracting officer at Castle lacks authority to execute purchase contracts for amounts in excess of $25,000. R. 248, 272, 338. Since the contracts at Castle exceeded $25,000 (e.g., $459,906.00; R. 251), the offers of contract to sell to the government are accepted in writing by higher military authority not located at Castle. R. 248.

Resale of milk purchased from nonappropriated funds at Castle is made at the following points:

Building	*Parcel Number*	*Date of Parcel Acquisition*
Base Post Exchange	#12 - R. 385, 643	3 17 47. R. 643
Base Officers' Club	#12 - R. 385, 643	3 17 47. R. 385, 643
Base Non-commissioned Officers' Open Mess	#12 - R. 385, 643	3 17 47. R. 385, 643

Prior to February 15, 1960, delivery of milk purchased for resale from appropriated funds was made to the Base Commissary located on Parcel 12 at Castle. R. 385, 642. Title to parcel 12 was acquired by the United States by deed from the City of Merced on March 17, 1947. R. 643. Similarly, prior to February 15, 1960, delivery of milk purchased from appropriated funds for troop ration was made to Parcel 12 at Castle. R. 643.

Appellants on February 5, 1960, filed suit in the state courts to enforce the California milk stabiliza-

tion act against the contractor delivering milk to Castle. R. 790. Ten days later, on February 15, 1960, the government directed the contractor to cease making delivery of milk to buildings located on Parcel 12, and to deliver the refrigerated trailer of milk to the 18.36 acre civilian housing tract located just outside the base proper. R. 350-351, 363, 385, 642-643. A government tractor, driver by Air Force personnel, then hooks onto the loaded trailer and delivers the milk to buildings located on Parcel 12. R. 350-351, 363, 385, 642-643.

C. Travis Air Force Base.

Travis Air Force Base, totaling 4131 acres in area, is located in Solano County, California. R. 805-817. The base was acquired by successive purchase and condemnation of separate parcels of land from private landowners between September 4, 1942 to June 17, 1958. R. 805-817. Bid invitations for milk to be purchased with appropriated funds originate from the Base Procurement and Contracting Office (procurement office) and are sent to persons on a "bidders list." R. 821, 825-832. Bid proposals are then returned by bidders to the procurement office. R. 822. The contracting officer at Travis lacks authority to execute purchase contracts for amounts in excess of $25,000. R. 822. Since the contracts at Travis exceeded $25,000 (e.g., $500,365.90, R. 834), the offers of contract to the government are manually accepted in writing by

higher military authority not located at Travis. R. 800, 850, 856. Notices of bid award are thereafter given from the Travis procurement office. R. 822.

Delivery of milk purchased from non-appropriated funds for resale at Travis is made at the following points:

Building	*Parcel Number*	*Date of Parcel Acquisition*
Base Post Exchange	#18-A—R. 644-645, 849	1 23 43 R. 806
Base Officers' Club	#47—R. 644-645, 849	5 11 46 R. 806
Base Noncommissioned Officers' Open Mess	#16—R. 644-645, 849	3 1 43 R. 806

Delivery of milk purchased from appropriated funds for resale at Travis is made at the following points:

Building	*Parcel Number*	*Date of Parcel Acquisition*
Commissary	#18-A—R. 849	1 23 43 R. 806

Delivery of milk purchased from appropriated funds at Travis for troop ration is made at the following points:

Building	*Parcel Number*	*Date of Parcel Acquisition*
Dining Hall #6; Dining Hall #7; Bldg. #381	#49—R. 991	5 26 46 R. 806
Dining Hall #1	#17-A—R. 849	1 22 43 R. 806
Inflight Kitchen; Dining Hall #2; Nursery	#16—R. 849	5 1 43 R. 806
3083 Mess Hall	#13—R. 849	2 23 43 R. 805
Cold Storage	#7—R. 849	12 4 42 R. 805

D. Oakland Army Terminal.

The Oakland Army Terminal, consisting of 478.6 acres owned by the United States and 122.4 acres of leased land, is located within the City of Oakland, California. R. 639. Title to the 478.6 acre area, consisting of tracts A-114, B-206, B-209, B-210, B-211, B-220, B-222, C-300, C-302, C-305 and C-306 was acquired by purchase and condemnation between January 15, 1941 to September 11, 1953. R. 442, 809; appendix pp. 231, 232. Tracts A-115, A-116, A-117, A-118, A-119, A-120, A-122, A-123, A-124, A-126, A-127, A-131, A-115-2 and A-119-2 are leased. R. 149, 639.

Bid invitations for milk purchased from appropriated funds for delivery to the Oakland Army Terminal originate from the Procurement Division, United States Army, Fort Mason, San Francisco, California, (R. 30, 117) and are sent to persons on a "bidders list." R. 28. The offers of contract to sell to the government are accepted in writing at Fort Mason. R. 30. The contract with Milk Producers Association of Central California provided for delivery of milk dispensing machines to the Enlisted Men's Mess at Fort Mason, San Francisco, at anti-aircraft missile sites in San Francisco, Coyote Hills (near Coyote), at Alvarado, California (near Hayward), and for the delivery of milk to the commissary officer at the Oakland Army Terminal. R. 34, 35.

Delivery of milk purchased from non-appropriated funds is made at Oakland at the following points:

Building	*Parcel Number*	*Land Interest*
Terminal Post Exchange	B-210, R. 647	Title acquired by deed, March 2, 1942. R. 369, 639
Terminal Officers' Club	A-119, R. 647	Parcel is leased. R. 149, 639
Terminal Post Exchange Restaurant	B-210, R. 647	Title acquired by deed, March 2, 1942. R. 369,639

Delivery of milk purchased from appropriated funds for resale at the Terminal Commissary and for troop ration is made at Oakland on Parcel B-210, R. 34, 639, 646. Title to Parcel B-210 was acquired on March 2, 1942. R. 369, 639.

III. CALIFORNIA AND FEDERAL ACTION RELATIVE TO CESSIONS OF JURISDICTION.

A. Castle and Travis Air Force Bases.

Section 355, Revised Statutes, as amended by the Act of October 9, 1940, 54 Stat. 1083, provides:

> ". . . it shall be conclusively presumed . . . that jurisdiction has not been accepted by the United States unless exclusive or partial jurisdiction were accepted . . . by filing a notice of such acceptance with the Governor of such State or in such manner as may be prescribed by the laws of the State where such lands are situated."

Pursuant to this statute, the United States Secretary of War sent to the Governor of California no-

tices that ": . . the United States accepts exclusive jurisdiction over all lands acquired by it for military purposes within the State of California, title to which has heretofore vested in the United States. . . ." Letters dated April 16, 1943 (R. 374) and January 3, 1944. R. 339. In addition, the Secretary of War on March 14, 1944, sent to the Governor of California a list of military installations within the state boundaries. R. 215-222.

From March 2, 1897, to September 19, 1947, California had in force a statute ceding "exclusive jurisdiction" over all lands within the state "ceded or conveyed" to the United States for military purposes provided that "A sufficient description by metes and bounds and a map or plat of the lands shall first be filed in the proper office of record in the county in which the lands are situated." Sec. 114, Calif. Gov. Code, codified by Calif. Stats. 1943, Ch. 134, p. 898, from Calif. Stats. 1897, Ch. 56, p. 51.

The government concedes that it has never complied with the parcel description and plat filing requirements of Section 114, Government Code, and the predecessor 1897 Statute, with respect to either the Castle or Travis reservations. Gov't. Br. 9; R. 349-350, 352-353, 643, 644, 646. The government further concedes that it has never made application to the California State Lands Commission for state consent to purchase land for military purposes at Castle and Travis. R. 644.

B. Oakland Army Terminal.

On April 21, 1949, the Secretary of the Army gave written notice to the Governor of California that the government had acquired 478.75 acres of land at the Oakland Army Terminal in Alameda County. R. 372. The notice further stated that jurisdiction of this acreage was accepted by the United States pursuant to Section 355, Revised Statutes of the United States "subject to each and all of the conditions and reservations prescribed in . . . Section 126, Government Code." R. 372.

This notice of April 21, 1949, did not comply with state procedure (R. 137, 372), and by letter of July 5, 1950 (R. 368), the Secretary of the Army filed an application requesting that the California State Lands Commission hold a public hearing to determine if the federal acquisition of the lands was in the public interest. R. 368-370. This notice also stated that the United States "assents to acceptance of federal jurisdiction over the subject land" . . . upon and subject to each and all of the conditions and reservations prescribed in said California Government Code Section 126, as follows: "The State reserves . . . the entire power of taxation . . . and reserves to all persons residing on such land all civil and political rights . . . which they might have were the consent of the State not given." R. 370. The described parcels of land included tract A-114 (excluding the 123.33 acres acquired 9/11/53; Appendix p. 231. R. 141-148) and tracts B-206, B-209, B-210, B-211, B-220, B-222, C-300,

C-302, C-305 and C-306, R. 99. After a public hearing, the State Lands Commission on October 5, 1950, entered its resolution finding "that the conditions prescribed in subdivisions (a), (b) and (c) of Section 126 of the Government Code of the State of California have been found to have occurred and to exist and that such acquisition is in the interest of the State." R. 140-148. On the date of this resolution, Section 126, Government Code (Calif. Stats. 1947, Ch. 1532, p. 3163), provided:

> ". . . the Legislature of California consents to the acquisition by the United States of land within this State upon and subject to each and all of the following express conditions and reservations, *in addition to any other conditions or reservations prescribed by law:*
>
> "(c) The United States must in writing have assented to acceptance of jurisdiction over the land upon and *subject to each and all of the conditions and reservations in this section prescribed;*
>
> "(e) In granting the consent, the Legislature and the State reserve . . . the State's entire power of taxation . . . ; and reserve to all persons residing on such land all civil and political rights . . . which they might have were this consent not given." (Emphasis added.)

In the same bill that amended Government Code Section 126, to give administrative control to the State Lands Commission, the 1947 California Legislature amended Government Code Section 113, to reserve

". . . the administration of the criminal laws of the State with respect to any land over which any jurisdiction . . . may be ceded or conveyed to the United States. . . . " Calif. Senate Bill 656, 1947 Calif. Legis. Sess., enacted as Stats. 1947, Ch. 1532, p. 3163.

The trial court found that this reservation of criminal jurisdiction was "applicable only to lands 'ceded' to the United States, as distinguished from lands acquired through purchases or condemnation" with state consent. 190 F. Supp. 645, 651. From this premise, the district court concluded that exclusive jurisdiction over the lands at Oakland had been ceded to the United States by virtue of Section 126. 190 F. Supp. 645, 652. Judgment was then entered on the government's motion for preliminary injunction permanently enjoining as unconstitutional enforcement of the California milk price regulations as applied to milk purchased by distributors from milk producers, and then delivered by milk distributors to the government at the Oakland installation. R. 666.

As previously noted, some of the parcels at Oakland are owned by the government and some are leased. App. Br. *supra*, p. 24. Title to those parcels which are owned were acquired between January 15, 1941 and September 11, 1953. R. 442, 809; Appendix p. 231. The government concedes that it has never recorded metes and bounds descriptions and a plat for any of these parcels as required by California Statutes of 1897, Chapter 56, page 51, or its codified successor, Government Code, Section 114. R. 646.

SUMMARY OF ARGUMENT

I. ENFORCEMENT OF THE CALIFORNIA MILK STABILIZATION ACT IS CONSISTENT WITH THE PERFORMANCE OF THE FEDERAL PROCUREMENT FUNCTION.

The three-judge district court held the California milk stabilization act unconstitutional under *Calif. Comm'n.* v. *United States*, 355 U.S. 534, on the legal theory that a military installation is a "place" within the meaning of that provision of the state act (Calif. Agr. Code, sec. 4361) which renders it unlawful for any "place for consumption on or off the premises" to purchase milk at less than the established state wholesale prices, and that the state act accordingly "place a prohibition on the Federal Government." The trial court distinguished *Penn Dairies, Inc.* v. *Milk Control Comm'n.*, 318 U.S. 261, on the ground that the Pennsylvania milk stabilization act was held not to apply to the federal government. But the highest California court has construed the California stabilization act as being inapplicable to the United States or its officers and has held that the act regulates only "the distributors who are independent contractors with the federal government." *Pacific Coast Dairy* v. *Dept.*, 19 Cal. 2d. 818, 830, 123 P. 2d 442, rev'd. on another ground, 318 U.S. 285 (1943). This construction that the California act does not apply to officers' clubs, post exchanges, post restaurants, commissary grocery stores and to federal officials purchasing for troop ration is in accord with judicial holdings that the similar milk stabilization acts of Pennsylvania and Massachusetts

do not regulate the United States. *Penn Dairies, Inc.* v. *Milk Control Comm'n.*, 344 Pa. 635, 26 A. 2d 441, 445, affirmed 318 U.S. 261 (1943); *Milk Control Board* v. *Gorsolini, Dairies, Inc.*, 301 Mass. 174, 16 N.E. 2d 641, 643 (1938).

Calif. Comm'n. v. *United States*, 355 U.S. 534 (1958) is distinguishable since the state common carrier rate regulation there held unconstitutional was found to threaten the discharge of a federal defense function. The contractors in *California Commission* were transporting government-owned military hardware, much of it of a classified and secret nature; and the proposed state regulation, according to the court's decision, would have delayed military shipments, made procurement operations an administrative morass, and would have revealed secret military information. Id. 355 U.S. 534, 545-546. In sharp contrast, the California milk stabilization act affects but one nonmilitary food item in the commissary grocery store or post exchanges, and but one such item in the troop ration. In no event does the state act place a federal official in the dilemma of paying the fixed California minimum price for milk or seeking penalties for obtaining lower prices. First, the act is not applicable to federal officials (*Pacific Coast Dairy* v. *Dept.*, 19 C. 2d 818, 830, 123 P. 2d 442, rev'd. on another ground, 318 U.S. 285), and second, federal officials can "procure a supply [of milk] from without the state" free of state regulation. *Penn Dairies, Inc.* v. *Milk Control Comm'n.*, 318 U.S. 261, 270 (1943). The state act, therefore,

comes within the precedents which sustain state taxation, safety and health regulation of contractors with the United States, where the effect on the United States is confined to a nondiscriminatory increase in costs. *Penn Dairies, Inc.* v. *Milk Control Comm'n.*, 318 U.S. 261 (1943); *Alabama* v. *King & Boozer*, 314 U.S. 1 (1941).

II. CALIFORNIA, BY VIRTUE OF ITS JURISDICTION OVER THE CASTLE, TRAVIS AND OAKLAND RESERVATIONS, MAY ENFORCE ITS MILK PRICE REGULATIONS AGAINST CONTRACTORS DELIVERING MILK TO THESE INSTALLATIONS.

A. Prior to February 5, 1960, delivery of milk to Castle, under purchase contracts executed at another installation (R. 248), was made to the commissary grocery store and to mess kitchens located on Parcel 12, located within state jurisdiction. R. 339, 385, 643, 644. On February 5, 1960, suit was filed in the state courts to require the contractor to comply with the California milk stabilization act. R. 790. On February 15, 1960, the government directed the contractor to make delivery to a vacant lot on Parcel A, an 18.36 acre civilian housing tract located adjacent to the base proper. R. 350-351, 363, 385, 642. On the basis that the original delivery of milk was being made on Parcel A, the district court permanently enjoined continuance of the State's suit. 190 F. Supp. 645, 653-654. The ground for holding the state enactment unconsti-

tutional was that exclusive jurisdiction over Parcel A had been transferred to the United States by California Political Code, Section 34 (Government Code, Section 1114), which provided:

> "The Legislature consents to the purchase or condemnation by the United States of any tract of land within the State for the purpose of erecting forts, magazines, arsenals, dockyards, and other needful buildings, reserving the authority to serve ~~and~~ execute process and the State's entire power of taxation as provided in this article." Stats. 1943, Ch. 134, p. 898, based on 1872 Political Code, Section 34.

This statute was not cast in the form of a cession of jurisdiction, and, therefore cannot be taken as having by implication surrendered exclusive jurisdiction to the United States. *Wilson* v. *Cook*, 327 U.S. 474, 486 (1946). Early cases such as *Fort Leavenworth R.R. Co.* v. *Lowe*, 114 U.S. 525, 531 (1885); *Surplus Trading Co.* v. *Cook*, 281 U.S. 647, 652 (1930); *United States* v. *Unzeuta*, 281 U.S. 138, 142 (1930) are inapplicable because the state statutes there considered contained express language ceding jurisdiction over the lands to the United States. 1875 Laws of Kansas, p. 95; Laws of Nebraska, 1887, p. 628; Arkansas Acts of 1903, p. 346. Instead, the 1872 California Legislature intended to satisfy the congressional requirement in effect from 1841 to 1940 prohibiting the improvement of federal sites until state consent to the purchase of the land were given. Section 3, Joint Resolution of September 11, 1841, 5 Stat. 468, codified

as 1875 Revised Statutes, Section 355, and repealed Act of February 1, 1940, 54 Stat. 19.

Constitution Article I, Section 8, provides in part:

> "The Congress shall have power . . . [17] . . . To exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular States, and the acceptance of Congress, become the seat of the government of the United States, and to exercise like authority over all places purchased by the consent of the Legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings; . . ."

Clause 17, made applicable by Political Code, Section 34 (Government Code, Section 111) to land purchased or condemned by the government within the state for military purposes, should be read literally and in the manner in which the Commerce Clause and Art. I, Sec. 8, cl. 12 (power to raise armies) are read. *Parker v. Brown*, 317 U.S. 341, 361-363; *Penn. Dairies v. Milk Control Comm'n*, 318 U.S. 261, 269. So read, the provision that "The Congress shall have power . . . to exercise like authority . . ." means that this power is effective to displace local law over military installations only as Congress chooses to avail of it.

If the court should find, contrary to appellants' position that a state's *unqualified* consent to the United States' purchase of land for military purposes results in a transfer of jurisdiction over the land by reason of the preemptive effect of Constitution Article I,

Section 8, clause 17, then it is relevant to note that the legislative consent to the federal purchase of military land expressed in Political Code, Section 34 (Government Code, Section 111), *was qualified* by Statutes of 1897, Chapter 56, page 51 (Government Code, Section 114), which provided:

> "The State cedes to the United States exclusive jurisdiction over all lands within the State held, occupied, or reserved on March 2, 1897 by the United States for military purposes or defense, and over all land which thereafter has been or which may be ceded or conveyed to the United States for such purposes reserving the authority to serve and execute process, and the State's entire power of taxation. A sufficient description by metes and bounds and a map or plat of the lands shall first be filed in the proper office of record in the county in which the lands are situated." Stats. 1943, Ch. 134, p. 899, eff. Aug. 4, 1943.

Admittedly, the United States failed to file land descriptions and plats of Parcel A at Castle with the County Recorder of Merced County (R. 543, 547, 643) and thereby failed to comply with conditions which the 1897 statute expressly makes precedent to the transfer of jurisdiction. *United States* v. *Watkins* (D.C.N.D. Calif. 1927), 22 F. 2d 437, 440; *Pothier* v. *Rodman* (C.A. 1), 291 Fed. 311, 319-321, rev'd. on other grounds, 264 U.S. 399 (1924). Government Code, Section 114 was clearly intended to encompass lands "purchased" at Castle with the state consent granted in Section 111, since it expressly mentions "all lands which . . . .may be *ceded or conveyed* to the United

States, ..." The term "ceded" here refers to lands within state borders which came into United States ownership because of their cession by Mexico (Treaty of Guadalupe Hidalgo, 9 Stat. 22), while "conveyed" imports a purchase of land. Sections 111 and 114 are similar to the West Virginia statute considered in *James v. Dravo Contracting Co.*, 302 U.S. 134 (1937). In the latter case the court found that a 1931 amendment reserving concurrent jurisdiction to West Virginia qualified the earlier 1881 consent to purchase language. Id. 302 U.S. 134, 145-146.

Further, Parcel A at Castle was purchased in 1943 from a private landowner with funds appropriated under the Lanham Act, 54 Stat. 1125, R. 349, 490, 493. Section 10 of this statute affirmatively provides that the acquisition of real property under the act "shall not deprive any State or political subdivision thereof of its civil and criminal jurisdiction in and over the property." Parcel A is now, as it has been since 1942, utilized as a defense housing project and needs the fire, police, health and education services available under state law. R. 349-351. The fact that administrative control of the housing project in September of 1942 was transferred within the government from the National Housing Agency to the Department of War should not deprive these persons of the protection of state jurisdiction.

B. No claim of exclusive jurisdiction is made by the government over the parcels at Travis under California Statutes of 1897, Chapter 59, page 51 ("Govern-

ment Code, Section 114) since there was no compliance with the land description and platting requirements of these statutes. R. 344, 348, 641, Gov. Br. 9. These parcels were acquired from September 1, 1942 to June 17, 1958 (R. 805-817), not between December 1942 and March 1943 as found by the trial court, 190 F. Supp. 645, 652. As at Castle, the purchase contracts for milk were executed at another federal installation, and, therefore, only the delivery of milk, not the sale, occurred at Travis. R. 800, 822, 834, 856. The statutes, federal and state, applicable to Travis are the same as for Castle with the exception that the record does not show if the civilian housing tracts at Travis were acquired under the federal Lanham Act, 54 Stat. 1125. R. 821. Therefore, the similar statutory and factual analysis which establishes that California exercises jurisdiction over Parcel A at Castle supports the finding that California exercises like jurisdiction over the parcels at Travis.

V. The district court held that ownership of the parcels comprising the Oakland Army Terminal were acquired in 1950 and that exclusive jurisdiction over these parcels was transferred in 1950 to the United States under Government Code, Section 126 (Stats. 1st Ex. Sess. 1940, Ch. 151, p. 1981, as amended Stats. 1947, Ch. 1562, p. 3163). But the several parcels at Oakland were acquired in successive purchases from January 15, 1941 to September 11, 1953, and parcels

[1] Memorandum For The United States, *Paul v. United States*, Supreme Court of the United States, October Term, 1961, No. 239, is cited Gov't. Br. 9.

totaling 123.33 acres are leased, not owned. R. 149, 639, appendix pp. 231-232.

Section 126, Government Code, on October 5, 1950, the date as of which the California State Lands Commission found that the State should give its consent to the acquisition of certain parcels at Oakland, provided that:

> ". . . the Legislature of California consents to the acquisition by the United States of land within this State upon and subject to each and all of the following express conditions and reservations, in addition to any other conditions or reservations prescribed by law: . . ."

Thus, Government Code, Section 126, like the similar Political Code, Section 34 (Government Code, Section 111) was not cast in the form of a cession of jurisdiction, and, therefore, was not effective to transfer exclusive jurisdiction over these owned parcels at Oakland to the United States. Section 126, at most, was intended by the Legislature to grant to Congress the power under Article I, Section 8, clause 17, to exercise exclusive legislation over Oakland. In addition California retained criminal and civil jurisdiction over Oakland because of the express *qualifications* to the State's consent made in Government Code, Sections 113 and 126, even if clause 17 would otherwise oust the State of jurisdiction.

Section 126 granted consent to the acquisition of land by the United States "upon and subject to each and all of the following conditions and reservations,

in addition to any other conditions or reservations prescribed by law . . ." (emphasis added). This reference to "any other conditions or reservations" in Section 126 clearly incorporates the reservation in Government Code, Section 113, of "the administration of the criminal law of the State with respect to any land over which *any jurisdiction* has been or may be ceded or conveyed to the United States . . ." (emphasis added). Just as the term "conveyed" in the 1897 cession statute (Government Code, Section 114) applied to any lands purchased by the government with the consent granted in 1872 Political Code, Section 34 (Government Code, Section 111), so the term "conveyed" in Section 113 included any lands purchased by the government with the consent given under Section 126. This language in Section 113 reserving state criminal jurisdiction first appeared in Statutes of 1891, Chapter 181, page 262, and was taken directly from the congressional statutes appropriating money for the construction of post office buildings in California (Act of February 28, 1885, 23 Stat. 336; Act of January 12, 1891, 26 Stat. 711; Act of April 28, 1890, 26 Stat. 73) and at the time of its 1891 enactment was understood to reserve state cognizance of offenses against state law committed on such building sites. 20 Ops. Atty. Gen. 611, 613 (1893), see 8 Ops. Atty. Gen. 418, 419 (1857).

In an area of sensitive federal-state relationships, the resolution of the status of the Castle, Travis and Oakland installations in favor of concurrent fed-

eral-state authority will be consonant with the declared federal policy ". . . that the federal government not receive, or retain, any measure whatever of legislative jurisdiction [over federally owned land in the several states], that it hold the installations and areas in a proprietorial interest status only, with legislative jurisdiction remaining in the several states." Jurisdiction Over Federal Areas Within the States, G.P.O., 1956, Pt. I, p. 70.,

III. CALIFORNIA CAN CONSTITUTIONALLY ENFORCE ITS MINIMUM DAIRY FARMER MILK PRICE REGULATIONS AGAINST CONTRACTORS BUYING FROM DAIRYMEN AND RESELLING TO THE UNITED STATES.

The district court found that Agricultural Code, Sections 4280(f) and 4361, pertaining to wholesale and retail minimum milk prices, imposed an unconstitutional prohibition on the Federal Government. 196 F. Supp. 645, 657. The court below also held that the state's wholesale milk price regulations could not constitutionally be enforced against contractors delivering milk to the Castle, Travis and Oakland installations because these were located on land within exclusive federal jurisdiction. 190 F. Supp. 645, 648-654. Yet, neither of these grounds for decision can apply to the state's *minimum milk producer price regulations* which impose price control at the dairy ranch or the processing plant where the producer transfers

either possession or the property interest in the milk to the handler. *United Milk Producers* v. *Cecil*, 47 C.A. 2d 758, 768-769, 118 P. 2d 830 (1941). The transaction controlled by the state's milk producer price law, therefore occurs within state jurisdiction and comes within *Penn Dairies, Inc.* v. *Milk Control Comm'n.*, 318 U.S. 261 (1943). The district court therefore erred in holding the state's minimum milk producer price statute unconstitutional.

IV. THE DISTRICT COURT COMMITTED PREJUDICIAL ERROR IN PROCEEDING TO ENTER FINAL INJUNCTIONS WITHOUT THE TAKING OF EVIDENCE, AND WITHOUT AWAITING PENDING CONSTRUCTION OF STATE LAW IN THE STATE COURTS.

In action No. 39030 (Oakland) filed March 30, 1960 (R. 7), the district court by *ex parte* restraining order issued the same day enjoined state officers from continuing the milk stabilization enforcement action filed the previous February 15, 1960, in the State Superior Court. R. 13-15, 154. Thereupon, and notwithstanding state officers' denials of the assertions that the United States exercises exclusive jurisdiction over the Oakland Army Terminal and that the government was threatened with irreparable injury (R. 156-160, 341-495, 657), the district court on motion for preliminary injunction entered its final judgment on the merits holding the state act unconstitutional. R. 666; 190 F. Supp. 645, 659-660. But the issue of the constitutionality of the state enactment was not before the lower court on motion for preliminary injunction.

Mago v. Canning Co., 309 U.S. 310, 316 (1940). Similarly, the district court in No. 39073 (Castle and Travis) by final judgment entered April 19, 1961 (R. 166), restrained state officers from proceeding in the pending state appellate court's appeal of the decision involving Castle Air Force Base. R. 550, 656. Again, as in action No. 39030, the state court jurisdiction first attacked since the state's action had been filed February 5, 1960 (R. 790), before the government's action was filed in the federal court on March 22, 1960 (R. 192). Thus, on motions for summary judgment and despite state officers' denials by answer and affidavit that the United States either exercised exclusive jurisdiction over Castle and Travis, or was threatened with irreparable damage, the court below closed the doors of the state courts to the State. R. 183, 197, 355, 524, 620, 661. In the context of the serious errors of fact made in the trial court's findings, the denials made in state officers' answers, affidavits and attached exhibits presented triable issues of fact which the court below should have resolved only after trial. See *Colorado v. Toll*, 268 U.S. 228, 231-232 (1925).

But, in addition, such trial should have been delayed pending clarifying state court decision. The same issues decided by the trial court were then, and now are, pending before the California Court of Appeals in the *Warne* case, R. 550, 656. Notwithstanding this pendency, the district court held the state act unconstitutional on the basis of the district court's

own construction of the several state statutes involved. The relation of Political Code, Section 34 (Government Code, Sec. 111), to Statutes of 1897, Chapter 56, page 51 (Government Code, Sec. 114), and the relation of Government Code, Section 126, to Government Code, Section 113, has never been considered by the California courts. Their state court interpretation may moot or change the posture of the constitutional issues posed by the government's complaints. The district court, therefore, erred in not abstaining from the exercise of its jurisdiction while these state enactments received clarifying construction in the pending appellate state court actions, *Leiter Minerals, Inc.* v. *United States*, 352 U.S. 220, 228-230 (1957).

ARGUMENT

I. ENFORCEMENT OF THE CALIFORNIA MILK STABILIZATION ACT IS CONSISTENT WITH THE PERFORMANCE OF THE FEDERAL PROCUREMENT FUNCTION.

A. The Production and Distribution of Milk Are Intimately Related to the Public Health and Welfare.

"The milking of animals in order to make use of their lactic secretions for human food was one of the greatest human inventions, but the domestication of milk has not been accompanied by a successful domestication of some of the meaner human impulses in all those engaged in the milk industry." *Queensboro Farm Products* v. *Wickard*, (C.A. 2d 1943) 137 F. 2d 969, 974.

These "meaner impulses" in the milk industry led California in 1935 to enact a milk stabilization act having as its purposes the insurance of an adequate supply of wholesome milk to the public, at reasonable prices, through elimination of demoralizing trade practices and the establishment of minimum prices to accomplish stability in the industry. Calif. Stats. 1935, Ch. 241, p. 922, as amended Stats. 1937, Ch. 3, p. 42, and Stats. 1937, Ch. 710, p. 1988. Pursuant to this statute, now Agricultural Code, Division 6, Chapter 17, the Director of Agriculture has established (1) minimum prices at which dairy farmers may sell and distributors may purchase milk, and (2) minimum prices at which distributors may sell milk. R. 283, 395-468. The milk statute and regulations are aimed primarily at the price the producer shall receive for milk, and not at the price which the milk dealer or consumer shall pay. *Knudsen Creamery Co.* v. *Brock*, 37 C. 2d 485, 490, 234 P. 2d 26 (1951).

By census enumeration of 1959, California had 8,046 dairy farms and 10,889 farms classified as having sold milk and cream. 1959 Final Report, U.S. Bureau of the Census, California, Vol. I, Part 48, Table 17, pp. 44-48. Dairy farm investment within the state amounts to approximately one billion dollars, and the dairy industry yields fully 12 percent of the total state income from all farm products. R. 680.

The California milk stabilization act therefore seeks to strengthen a paramount industry in such manner as

to protect the health and prosperity of the state. R. 680-685.

Twenty-three states have enacted milk stabilization statutes similar to California's. Appendix p. 232. A survey by the United States Department of Agriculture estimated that state milk stabilization statutes directly controlled between 16 and 17 billion pounds of milk in 1958, of which 12 billion pounds was consumed in fluid form. Role of Governments in Pricing Fluid Milk in the United States, U.S. Dept. of Agr., A.M.S. 335, 1959, p. 21.

Because the economy of the milk industry is so turbulent and eccentric, government controls have been found at once necessary and difficult. *Hood* v. *DuMond*, 336 U.S. 525, 529 (1949). These difficulties revolve in considerable measure about the complex relations between the dairy farmers and the distributors who buy the milk from the farmers for marketing in fluid or processed form, directly or indirectly through others, to the ultimate consumers. The supply of milk is subject to seasonal fluctuations which, under normal conditions, are substantial *Brannan* v. *Stark*, 342 U.S. 451, 460 (1952). The production of milk in the spring and summer months is from 50 percent to 100 percent greater than the production of milk in the autumn and winter months. On the consumption side, milk is consumed in, roughly, the same quantities in all months subject to daily fluctuations which require the industry to carry an operating reserve of approximately 15 percent. In Los Angeles, for ex-

ample, the volume of fresh milk distributed during warm weather may increase as much as 10 to 15 percent, while comparable decreases occur during cold snaps.[7] This surplus milk, over and above the quantities used for fresh milk consumption cannot be satisfactorily stored for long periods of time, and if a metropolitan area is to have an adequate supply of milk in the fall and winter months, the production of milk for that market in the spring and summer months must be in excess of the demand, during that time, on the fluid milk market. This seasonal surplus "must necessarily occur during those periods in the spring and summer if there are to be enough cows to furnish the requisite supply at periods when the milk yield is less. *Grand View Dairy* v. *Jones*, (C.A. 2d, 1946) 157 F. 2d 5, 7, cert. den. 329 U.S. 787 (1946).

Milk is easily contaminated, and serves as a culture medium in which pathogenic organisms may survive and multiply. Milk is highly perishable, and is "a fertile field for the growth of bacteria." *United States* v. *Rock Royal Co-Op.*, 307 U.S. 533, 549 (1939). To guard against diseases that are transmissible through fluid milk, strict bacteria count standards are required if the milk is to be marketed as fluid milk. Calif. Agr. Code, Sec. 460 et seq. In addition, state law provides for the inspection of dairy cattle so as to exclude milk from cows that suffer from mastitis, tuberculosis, Bangs' disease, or other diseases. Calif. Agr. Code, Sec. 535 et seq. The result is that milk

[7] Tipley, Public Regulation of Milk Marketing in California, University of California Press, 1938, p. 5.

which is produced for fresh use has higher costs of production than milk which is produced for manufacturing uses. Yet, milk which is produced for fresh use, but which is surplus to that use, is disposed of to manufacturers at the manufacturing price and this surplus milk comes into price competition with milk which is produced at lower cost for manufacturing purposes.

Prior to World War I, dairy farmers attempted to bargain with distributors for a flat price which would be applicable to all of the milk delivered to the distributor. Flat prices for milk, however, had peculiarly unstabilizing effects upon the marketing of milk. Under the flat price system, each distributor paid the same price, regardless of the use he made of his milk. Since it was not possible for a distributor to calculate his daily requirements for fluid sales with preciseness, and it was even more difficult for the dairy farmer to regulate the production of his dairy herd to match his distributors' sales, there normally was an excess of milk in the fluid milk plants over the daily fluid requirements. Distributors who had excess supplies usually reacted in one of two ways. They took fresh milk sales from other distributors by offering the excess at reduced prices which, in turn, were passed back to the dairy farmers since the fixed transportation, processing and sales expenses were paid first out of any returns; or, the distributor refused to accept the full quantity of milk offered by the dairy

farmers, who then were left in possession of perishable "homeless" milk.

To meet this problem, the California milk stabilization act provides for the establishing of milk producer prices on a class-use basis so as to encourage distributors to accept milk regularly from farmers who have made the investment required to produce adequate quantities of high quality milk, even in periods in which the distributor has no fluid outlet for some of the milk purchased. Calif. Agr. Code, Sec. 4225 et seq. This system of classified prices requires the payment to milk producers of a higher price for milk sold in fluid outlets than for milk processed into manufactured products like butter and cheese.

However, with milk producer price stabilization, the costs of such factors as raw product, power and public utility services and labor, accounting for nearly 80 percent of the ultimate price paid by consumers were fixed either by state law or by collective bargaining contracts with labor unions.[1] Such high fixed costs encouraged the development of uneconomic competitive practices as distributors sought to increase plan efficiency by increasing sales volume. Such practices included the supplying of free refrigeration cabinets to grocery stores, and the frequent delivery to such stores of small quantities of milk. These inefficiencies tended to be present even after insolvency, since the creditors acquired the business at a fraction of the

[1] Tinley, op. cit. footnote 7, supra, p. 46, at page 78.

original costs and continued operations in the same manner.

These factors, among others, led the Legislature to enact legislation authorizing the Director of Agriculture to establish minimum wholesale milk prices which in the aggregate were to cover only the reasonable necessary costs of hauling, processing, selling and delivering as incurred by efficient distributors. Calif. Agr. Code, Sec. 4355-4360. These provisions eliminated the possibility of collusive wholesale price fixing by distributors since prices were fixed by a state official subject to public scrutiny. Efficient distribution of milk was assured by the enactment of detailed unfair practice provisions. Calif. Agr. Code, Sec. 4280.

Obviously, the heart of the state stabilization act is the requirement that all milk sold in fluid outlets receive the full price. This is so because the minimum price for milk sold in fluid outlets represents the major proportion of the blended price received by dairy farmers. As previously noted, there is in the dairy industry a combination of circumstances which place the dairy farmer at a disadvantage in bargaining for the sale of his milk. These disadvantages are so severe that serious economic consequences result to a large number of members of the community unless government regulation is imposed. *Nebbia* v. *New York*, 291 U.S. 502, 515-518 (1934). The government is the single largest purchaser of milk in California, having purchased 29,057,000 gallons in 1959. R. 348. These federal purchases have a particularly strong

unstabilizing influence on the market because of the large quantities purchased under one contract, e.g. $459,906. R. 251; $500,365. R. 834. By virtue of this strong bargaining power, the government drove the prices paid to producers below the costs of production as soon as the federal court rendered the state milk stabilization act unenforceable as applied to contractors reselling milk to the government. R. 682-683. This action directly undermined the legislative objectives of the milk stabilization act in two ways. First, California dairy farmers sustained losses at an annual rate calculated at not less than $6,900,000 annually. R. 684. Secondly, the California consumer was required to pay a premium for milk, the premium being measured by the difference between the returns from federal sales and the cost of producing and distributing the milk. R. 683.

These facts show that the California milk stabilization act is intended to protect the State's supply of milk by stabilizing its marketing. This stabilization insures that the milk producer will receive his costs of production and that distribution of the milk will be made efficiently, in the interest of the consumer. State officers are, therefore, under a duty to enforce both the milk producer and the wholesale price provisions of the state law, and seek to sustain the constitutionality of both. The injunction of the district court prevents appellants from carrying out this duty, to the detriment of the California consuming public, and the producers and distributors comprising the dairy industry in this State.

B. The California Milk Stabilization Act Does Not Impose a Prohibition on the National Government or Its Officers.

1. THE DISTRICT COURT REFUSED TO FOLLOW CONTROLLING STATE JUDICIAL PRECEDENT

The District Court struck down the state act saying:

"We conclude, therefore, that even if the *Penn Dairies* case [318 U.S. 261] has not been in effect overruled by the *Public Utilities* case [335 U.S. 534], it is inapplicable here because the California Milk Stabilization Act 'places a prohibition on the Federal Government' within the meaning of the *Public Utilities* case, and therefore, so conflicts with federal procurement statutes and policy as to be invalid under the Supremacy Clause—Art. VI, Sec. 2." 100 F. Supp. 645, 657.

The section below upon Agricultural Code, Section 4361, does not include by name either the United States or federal procurement officers. Notwithstanding, the district court held that the language was sufficient to include by implication the Government, and government procurement officers, because the State made the wholesale price regulations applicable to milk purchased by "all retail stores, restaurants, confectionaries, or other places for consumption on or off the premises." Agr. Code, Sec. 4361.

4361. . . . no retail store, restaurant, confectionery or other place for consumption on or off the premises shall purchase from any distributor . . . any fluid milk or cream or either of them at less than the prices as established by the director.

The trial court also relied on Agricultural Code Sections 4280.5 and 4113. Section 4280.5 makes it unlawful for a

The district court, by adopting the construction that the California Legislature intended to include the United States within the phrase "other places for consumption on or off the premises" (190 F. Supp. 645, 657), refused to follow the contrary authoritative state court decision (*Pacific Coast Dairy* v. *Dept.*, 19 C. 2d 818, 123 P. 2d 442, rev'd. on another ground, 318 U.S. 285 (1943)), disregarded the opposite interpretation of the statute by the state official charged with the administration of the statute (R. 620; see *Driscoll* v. *Edison Co.*, 307 U.S. 104, 115 (1939)); and adopted a construction of the statute rendering it unconstitutional where the statute was "reasonably susceptible of another which renders it valid." *Sibbach* v. *American National Bank*, 178 U.S. 289, 300 (1900).

The cited sections were in effect March 12, 1942, the date of the decision by the Supreme Court of California in *Pacific Coast Dairy* v. *Dept.*, 19 C. 2d 818, reversed on another ground, 318 U.S. 285 (1943). Thus, these same provisions were before the highest state court at the time of its decision holding that the

distributor to purchase, process, bottle, transport, deliver or handle fluid milk which is to be sold at less than the state minimum wholesale or retail milk prices. Distributor minimum retail price regulations are inapplicable in this case since no retail home delivery routes are involved. A "distributor" is any person who purchases or handles fluid milk for sale excluding retail stores and establishments (restaurants) where milk is consumed on the premises. Section 4210. Section 4110 makes violation of the milk statute a crime punishable as a misdemeanor. See footnotes 1 and 11, *infra*, pp. 55-56.

[11] Agr. Code, Secs. 4361, 4280 (f), and 4110, formerly appeared respectively in Agr. Code, Secs. 736.13, 736.3 (a) (6), and 737.7 (a), as amended by Stats. 1941, Ch. 1214, pp. 3011, 3017 and 3020.

milk stabilization act "regulates not the Army but the distributors who are independent contractors with the federal government." Id., 194, 24 S.E.2d 818, 830. The district court therefore erred in refusing to follow this construction of the state milk stabilization act since it was bound by the decision of the Supreme Court of California "as though the meaning as fixed by the court had been expressed in the statute itself in express words." *Guaranty Trust Co. v. Blodgett*, 287 U.S. 509, 513 (1933); *Salbagstad v. Salbagstad*, 276 U.S. 260, 270 (1928).

The construction by the Supreme Court of California that the statute does not apply to either the United States or to its procurement officers is plainly correct, and is in accord with the decision of the Supreme Judicial Court of Massachusetts holding that the similar Massachusetts milk stabilization act was not applicable to either the government or its officers. *Milk Control Board v. Gorsline Dairies, Inc.*, 301 Mass. 171, 16 N.E.2d 641, 643 (1938); *see Patterson Milk and Cream Co., Inc. v. Milk Control Board*, 118 N.J.L. 385, 192 A. 838 (1937). New Jersey milk stabilization act. The United States Comptroller General also has expressed the opinion that the meaning of

To 1939 statute, Agr. Code, Sec. 736.21, was amended by Stats. 1939, Ch. 734, p. 2776, to add the words "or to the purchaser of any retail store, restaurant, confectionery, or other place for consumption on or off the premises" after the words "milk to" in the first sentence. Emphasis added. This amendment clarified the statute so as to expressly cover the retail grocery store which purchased milk for resale for consumption off the premises. The amendment thus shows no legislative intent to change the construction to be given to *Pacific Coast Dairy v. Dept. of Agr.*, 318 U.S. 285, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333,

the California milk stabilization act is upon the contractor, and not upon the government. 23 Comp. Gen. 454 (Sept. 1, 1943).

In *Penn Dairies, Inc.* v. *Milk Control Comm'n.*, 318 U.S. 261, this court had before it the Pennsylvania Milk Control Law, Sections 101-1302, 1937 Pa. Laws, No. 105, p. 417, as amended 1941 Pa. Laws, No. 177, p. 443 (July 24, 1941), which authorized the fixing of minimum wholesale milk prices to be "received by milk dealers." Sec. 803, as amended. Section 103, as amended, defined "milk dealer" to include "any person, including any store, . . . who purchases . . . milk . . . for sale. . . ." "Store" was defined to include "grocery store, hotel, restaurant, . . . or any similar mercantile establishment which sells or distributes milk." Section 103, as amended. Violation of the statute, or its regulations was made a crime punishable as a misdemeanor. Sections 1001-1002. The Supreme Court of Pennsylvania in *Penn. Dairies, Inc.* v. *Milk Control Comm'n.*, 344 Pa. 635, 26 A. 2d 431, 435 (May 25, 1942), adopting the opinion in 148 Pa. Sup. 261, 270, 24 A. 2d 717 (March 3, 1942), affirmed, 318 U.S. 261 (1943) stated: "No attempt is made in the law or in the order of the board to give any order or direction to the [Indiantown Gap] Reservation or its officers." This construction of the state enactment by the State Supreme Court was accepted by this Court in the statement:

> "Here the state regulation imposes no prohibition on the national government or its officers. They

> may purchase milk from whom and at what price they will, without incurring any penalty." *Penn Dairies, Inc.* v. *Milk Control Comm'n.*, 318 U.S. 261, 270.

The language in California Agricultural Code, Section 4361, is substantially the same as Section 803, as amended, of the Pennsylvania statute considered in the *Penn Dairies* case. It follows that the similar construction of the California statute by the Supreme Court of California is the correct one, and that the contrary interpretation by the district court in this case is in error.

2. THE DISTRICT COURT CONDEMNED THE STATE MILK PRODUCER PRICE REGULATIONS ON THE BASIS OF A HYPOTHETICAL CONTROVERSY.

The trial court held that California may not constitutionally fix either the minimum milk prices at the producer-distributor level or the price to be received by the distributor for milk ultimately delivered to federal military installations. R. 666, 668. The basis for striking down Section 4280(g) [14] (producer pric-

[14] 4280(g) "The payment by a distributor to any producer, including any association of producers, or the receipt by a producer, including any association of producers, from a distributor, of a lesser price for any fluid milk or fluid cream or fluid skim milk which is distributed to any person, including agencies of the federal, state or local government, located upon property within the geographical limits of any marketing area for less than the minimum prices established by the director to be paid by distributors to producers for fluid milk, or the milk fat and skim milk contained therein, or fluid cream or fluid skim milk for said marketing area. . . ."

ing), and Section 4280(f)[13] (wholesale pricing), was the finding that a separate and more general wholesale pricing section (Agr. Code, Sec. 4331)[14] was invalid as a restriction on the United States. 190 F. Supp. 645, 657. The California milk stabilization act includes an adequate severability clause. Agr. Code, Sec. 4420(b).[15] The California Legislature here specifically denies that the several sections in the statute were intended to constitute a unitary system, no part of which can fail without destroying the rest. If therefore arguendo, Section 4361 is unconstitutional as applied, that invalidity should not extend to the remaining regulatory provisions of the statute, nor to the appli-

[13] 4280(f). "The purchasing, processing, bottling, transporting, delivering or otherwise handling in any marketing area of any fluid milk or fluid cream or fluid skim milk which is to be or is sold or otherwise disposed of by such distributor at any place in the geographical area within the outer, outside and external boundaries or limits of such marketing area, whether such place is a part of the marketing area or not, at less than the minimum wholesale and minimum retail prices effective in such marketing area."

[14] 4361. "No distributor shall sell to any retail store, restaurant, confectionery or other place for consumption on or off the premises, or to any consumer, and no retail store, restaurant, confectionery or other place for consumption on or off the premises, shall purchase from any distributor or sell to any consumer, any fluid milk or fluid cream, or either of them, at less than the prices as established by the director under the provisions of this article."

[15] 4420(b). "If any article, section, subsection, sentence, clause or phrase of any provision of Chapter 17 of Division 6 of this code is for any reason held to be unconstitutional, such decision shall not affect the validity of the remaining provisions of said chapter. The Legislature hereby declares that it would have enacted such article, section, subsection, sentence, clause or phrase of said chapter irrespective of the fact that one or more other articles, sections, subsections, sentences, clauses or phrases be declared unconstitutional."

cation of the remaining provisions of Section 4361, as amended, to distributors.

No attempt has been made by state officers to enforce Section 4361 against either the government or its officers. R. 620-621.[*] The district court therefore entered into a hypothetical inquiry regarding the reach of Section 4361 for the purpose of condemning the entire state statutory scheme. 190 F. Supp. 645, 657. In a similar context this court stated:

> "By the cross bill, defendants seek a judgment that each and every provision of the Act is unconstitutional. It presents a variety of hypothetical controversies which may never become real. We are invited to enter into a speculative inquiry for the purpose of condemning statutory provisions the effect of which in concrete situations, not yet developed, cannot now be definitely perceived. We must decline that invitation." *Electric Bond Co. v. Comm'n.*, 303 U.S. 419, 443 (1938). See *Harris Cement Co. v. Detroit*, 362 U.S. 440, 442, n. 3 (1960).

3. THE PROVISIONS OF THE CALIFORNIA MILK STABILIZATION ACT ARE DISTINGUISHABLE FROM THE STATUTE CONSIDERED IN THE PUBLIC UTILITIES CASE.

The trial court failed to note essential differences between the California milk statute and the California

[*] In *People v. Cena*, United States District Court, N.D. Calif., S.D., #39080, California filed suit for declaratory judgment that "neither the United States, nor its officers and employees at Travis Air Force Base . . . are controlled by or subject to the terms of the California milk stabilization statute." 190 F. Supp. 645. The government removed the case to the District Court and there is now pending a motion by state officers to have the action be remanded to the state courts. See *Tucker Warehouse, Inc. v. United States*, 352 U.S. 220, 228-230 (1957).

public utility statute in deciding that the instant case was controlled by the decision in *California Comm'n. v. United States*, 355 U.S. 534 (1958), 190 F. Supp. 645, 657. In the state court proceedings, California sought to enforce the state milk producers' minimum price regulations (R. 744, 756, 769); Agr. Code, Section 4280(g), and to enforce the state minimum wholesale price regulations (R. 150, 550, 655-656, 790; Agr. Code, Section 4280(f).[17] Both sections are specifically limited in their application to the contractor with the United States, and were sought to be enforced only against distributor corporations who had made ultimate delivery of the milk to various military installations. R. 150, 744, 756, 769, 790. It is noted that no contention is made in this case that the government processed or packaged the raw milk, or that it otherwise acted as a "distributor" of milk.

The restrictive language in Sections 4280(f) and 4280(g) sharply contrasts with the wording in the California Public Utilities Code sections considered by the Court in *Calif. Comm'n. v. United States*, 355 U.S. 534 (1958). Section 530 (Calif. Stats. 1955, Ch. 1966, p. 3608) provided that the California Public Utilities Commission "may permit common carriers to transport property at reduced rates for the United States . . . . to such extent and subject to such conditions as it may consider just and reasonable."

[17] While the wholesale minimum price violation complaints filed in the state courts charged that the defendants as "distributors" had, in failing to receive the state minimum wholesale prices, violated "Chapter 17, Division 6," the specific applicable provision is section 4280(f R. 150, 550.

Public Utilities Code, Section 486, required that common carriers file their rates with the commission and Section 494 required that common carriers charge the rates filed with the commission. Section 2112 applied criminal penalties to "Any person . . . who procures, aids, or abets any public utility in such violation" of the Public Utilities Code. The Court found that Sections 530 and 2112 were applicable to the United States and its contracting officers as "shippers" who did business with common carriers, and therefore that the statute on its face did "deny the United States the right to ship at reduced rates, unless the commission first gives its approval." *Calif. Comm'n. v. United States*, 355 U.S. 534, 538 (1958).

The Public Utilities Code sections considered in the *California Commission* case are therefore distinguishable from Agricultural Code Section 4280(g) which requires the contractor to pay and the producer to receive the established milk producer price and from Section 4280(f) which requires the contractor to receive the applicable wholesale minimum milk price when it delivers milk to the government. It follows that the district court erred in relying on an irrelevant statute which it misconstrued in order to bring the state milk stabilization act within the rule of *Calif. Comm'n. v. United States*, 355 U.S. 534 (1958).

The trial court suggested in its opinion that *Penn Dairies, Inc. v. Milk Control Comm'n.*, 318 U.S. 261 (1943) had been overruled by the decision in *Calif.*

Comm'n. v. United States, 355 U.S. 534 (1958), 190 F. Supp. 645, 657. That the *Penn Dairies* case was not overruled by *California Commission* is made clear by the court's statement:

> "*Penn Dairies v. Milk Control Comm'n.*, 318 U.S. 261, *can likewise be put to one side*. There the question, much mooted, was whether the federal policy conflicted with the state policy fixing the price of milk which the United States purchased. The Court concluded that the state regulation 'imposed no prohibition on the national government or its officers.' Id. 318 U.S. at 270. Here, however, the State places a prohibition on the Federal Government." (Emphasis added.) Id. 355 U.S. 534, 544.

As noted before, the provisions of the California milk stabilization act are substantially the same as in the Pennsylvania milk statute considered by the court in *Penn Dairies v. Milk Control Comm'n.*, 318 U.S. 261 (1943) and are dissimilar to the Public Utilities statute considered in *Calif. Comm'n. v. United States*, 355 U.S. 534 (1958). It necessarily follows that the instant case is controlled by the reasoning of the *Penn Dairies* case in which the state milk statute was held to "impose no prohibition on the national government or its officers." Id. 318 U.S. 261, 270.

The trial court also failed to note significant factual differences between *Calif. Comm'n. v. United States*, 355 U.S. 534 (1958) and the facts in the instant case. The public utility regulation considered in *California*

Commission threatened to hamper the discharge of the federal defense function. The contractors in *California Commission* were hauling government-owned military hardware, much of it of a classified and secret nature. Many of the shipments commingled goods moving in interstate commerce, and not subject to California rate regulation, with goods in intrastate commerce, and, therefore, subject to asserted state rate regulation. The Court in that case was therefore justified in finding that the proposed utility rate regulation would unduly delay military shipments, render procurement operations an administrative morass, and would endanger national security by forcing disclosure of the contents of secret military shipments. 355 U.S. 534, 545-546; compare findings of the trial court in *California Commission* in 141 F. Supp. 168, 174-181.

Calif. Comm'n v. *United States*, therefore comes within the line of decisions which have invalidated state regulations which interfere with the effective discharge of federal functions. *Mayo* v. *United States*, 319 U.S. 441 (1943); *Johnson* v. *Maryland*, 254 U.S. 51 (1920). The contractors in the instant case are only regulated with respect to the price they may sell milk owned by themselves, not the government. Federal commissary grocery store, post exchange and officers' club officials are not faced with the alternative present in *California Commission* of either paying the state established hauling rates or risking state imposed penalties for obtaining lower rates. First, these activi-

ties can procure a supply of milk at unregulated prices from without California.' *Baldwin* v. *G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935). Secondly, as distinguished from the state statute considered in *California Commission*, the California milk stabilization act does not apply to United States officials in their purchase of milk. *Pacific Coast Dairy* v. *Dept.*, 19 C. 2d 818, 123 P. 2d 442 reversed on another ground, 318 U.S. 285 (1943). Lastly, the difficulties present in *California Commission* where nonregulated interstate military shipments were commingled with intrastate military hauling are absent here since such commingling of milk does not occur in the course of its marketing. The California milk stabilization act, therefore, does no more than to establish the minimum price of but one item purchased by the government, and comes within the precedents which sustain nondiscriminatory state taxation and safety regulation of contractors with the United States, even though such increased costs are passed onto the government. *Penn Dairies, Inc.* v. *Milk Control Comm'n.*, 318 U.S. 261 (1943); *City of Detroit* v. *Murray Corp.*, 355 U.S. 489 (1958); *Alabama* v. *King & Boozer*, 434 U.S. 1 (1941); *Stewart & Co.* v. *Sadrakula*, 309 U.S. 94 (1940); *Baltimore & A. R. Co.* v. *Lichtenberg*, 176 Md. 383, 4 A. 2d 734 (1939), appeal dismissed *sub nom. United States* v. *Baltimore & Annapolis R. Co.*, 308 U.S. 525 (1939).

C. The California Minimum Milk Price Regulations Do Not Conflict with Federal Procurement Policy.

1. CONTRACTORS DELIVERING MILK TO OFFICERS' CLUBS, NONCOMMISSIONED OFFICERS' CLUBS, POST EXCHANGES AND POST RESTAURANTS ARE NOT IMMUNIZED FROM COMPLIANCE WITH LOCAL MILK STABILIZATION STATUTES.

Officers' clubs, noncommissioned officers' clubs, post restaurants and post exchanges located at Castle, Travis and Oakland purchase milk for resale at such activities. R. 643, 644-645, 647. The buildings, equipment and furnishings for officers' clubs, other service clubs and post exchanges are generally acquired from appropriated funds, but direct operations including the purchase of milk for resale are made with nonappropriated revolving funds. R. 515-516, 537-540. The statutory basis governing the operation of these activities is the authority of the several Secretaries of Defense to establish a system of regulation for the administration of the affairs of the armed forces. *Standard Oil Co.* v. *Johnson*, 316 U.S. 481, 483 (1942), post exchanges; *Johnson* v. *Yellow Cab Co.*, 321 U.S. 383, 388, 393 (1944). Since these activities are conducted with nonappropriated funds, none of their financial obligations are borne by the government. R. 515-516, 537-540.[18] *Standard Oil Co.* v. *Johnson*, 316 U.S. 481, 483 (1942). The burden of state regu-

[18] e.g., "No part of any Air Force or Army Appropriation made by this Act shall be used in any way to pay any expense in connection with the conduct, operation, or management of any post exchange, branch exchange, or subexchange within any State, Territory, or the District of Columbia. . . ." Sec. 623, National Military Establishment Appropriation Act, 1950, 63 Stat. 987, 1022.

lation of the contractor would therefore not be passed onto the government, but would be reflected in increased prices which these activities would charge their patrons. Federal procurement policy is similarly unaffected since the armed services procurement act applies only to the purchase, and contracts to purchase, "for which payment is to be made from appropriated funds" and does *not* apply to procurement from nonappropriated funds. 10 U.S.C. 2303(a). It necessarily follows that the district court erred in striking down the California milk stabilization act as applied to milk delivered to nonappropriated activities as being in conflict with the federal procurement statutes. R. 666, 668.

CONTRACTORS DELIVERING MILK TO COMMISSARY GROCERY STORES ARE NOT IMMUNIZED FROM COMPLIANCE WITH LOCAL MILK STABILIZATION STATUTES.

"Evidence is wanting that Congress in authorizing competitive bidding, has been so concerned with receiving the lowest possible price for articles furnished to the government that it wished to set aside all local regulations affecting price." *Penn Dairies, Inc. v. Milk Control Comm'n.*, 318 U.S. 261, 274 (1943).

"It should be borne in mind that in the *Penn Dairies* case the court was dealing with just one commodity, milk, which is nothing more than one item in the ration for the troops. Although, of course, this item of the ration is tremendously important from the standpoint of health, economically it involves only an infinitesimal fraction of the cost of maintaining and supplying the troops

Brief for the United States, Transcript of Record, *Public Utilities Comm'n. v. United States*, Supreme Court of the United States, October Term, 1957, No. 23, p. 184.

"The fact that the U.S. Government, through the Castle Air Force Base commissary, enables our airman [sic] to buy food at a minimum cost for use by them and their dependents often means the difference between them living within their income and not being able to do so. . . . I am informed that increased price in milk does not accrue to the State of California, but to processors and producers of milk. . . . Therefore, it is my opinion that the real losers in any [milk] price increase will be my airmen. . . ." Affidavit of Colonel Dysinger, R. 242-243.

These three quotations lay bare the crux of the government's endeavor to destroy the California milk stabilization act. The armed services are really not concerned that a price increase would occur on that portion of its milk which is obtained for troop ration and which is paid from federal tax revenues (R. 634, 643, 645, 646). The reason being that milk constitutes but one item in the troop ration, constitutes only a small portion of the milk purchased at military installations (22 percent at Oakland; R. 646; 27 percent at Castle; R. 643; 36.5 percent at Travis, R. 645). In addition, the Commodity Credit Corporation pays a subsidy of 8.12c per quart for milk consumed over the eight-cent troop ration in order to encourage the consumption of milk. United States Department of Agriculture bulletin 217-61, July 12, 1961; Ag-

ricultural Act of 1949, 63 Stat. 1051, as amended by the Agricultural Act of 1954, 68 Stat. 897, 900.[19] The remaining percentages of milk delivered to these installations are resold through the commissary grocery stores (Oakland 78 percent, Castle 73 percent, Travis 64.5 percent, R. 643, 645, 646).

The item that motivates the government is the belief that existing congressional pay scales are insufficient to allow personnel "sufficient monies to support their families at even minimum acceptable standards." R. 242.

Congress has specifically rejected the argument advanced here that Congress has failed to make adequate provision for the armed services, and therefore, that the California dairy farmer should shoulder part of the burden through the absorption of losses in their production of milk purchased for sale through commissaries. In hearings before the House Committee on Armed Services, the armed services represented that post exchanges and commissaries are needed: ". . . 3. To provide merchandise at cheaper than ordinary prices in order to implement the service pay of underpaid military personnel." The committee refused to accept this argument stating:

"Considering the third point, we wish to point out that the House Committee on Armed Services has

[19] Prior to April 1, 1961, the subsidy paid by the Commodity Credit Corporation under this program was $4.10 cwt. of 3.8% milkfat milk (8.12¢ per qt. 3.5% milk). Appendix p. 219. Appellants are informed by the United States Department of Agriculture that after April 1, 1961, the subsidy was increased to $4.35 cwt. of 3.8% milkfat milk (8.62¢ per qt. 3.5% milk).

led the way in attempts to increase the pay of service personnel through appropriate legislation. After lengthy and difficult hearings this committee has approved and the House has passed appropriate legislation. We are confident that the Senate . . . will take favorable action on the pending bill. If such favorable action is taken by the Senate [Career Compensation Act of 1949, 63 Stat. 802], *the allegation that service personnel are underpaid must fail.* We subscribe to the remaining reason, convenience and morals, as being the sole justification for the maintenance and operation of post exchanges, ship's service stores, and commissaries." (emphasis added). Print No. 115, Hearings before the House Armed Services Committee, 1949-1950, p. 4001.[20]

No claim is made that the State minimum producer prices are fixed at unfair levels. No claim is made that the wholesale price fixed for the contractor, minus a special 12½ percent volume discount (R. 419, 442, 467, 472) which is not available to private supermarkets, provides an unduly profitable margin above the distributor's raw product and handling costs. What is shown is that the government can always find a contractor who is forced through economic necessity to obtain federal milk contracts at the expense of his suppliers. R. 30, 246. Milk producers are forced to absorb much of the contractor's losses incurred under such contracts because of unequal bargaining

[20] The pay scales increased in the 1949 act were again raised by the Act of May 20, 1958, 72 Stat. 122.

position. R. 681. This inferior position derives from the fact that a large number of dairy farmers sell a highly perishable product to a relatively few contractor-distributors. R. 681.

10 U.S.C. 2304(a)(8) authorizes the heads of agencies to negotiate contracts in lieu of contracting by formal advertising, where "the purchase or contract is for property for authorized resale." Although detailed regulations governing the operation of commissary grocery stores have been promulgated under the procurement act (R. 622-637), neither these regulations, nor the statute itself, purport to exempt contractors with these commissaries from state milk stabilization regulation.

10 U.S.C. 2304(a)(8) is a codification of Section 2(c)(8), of the Armed Services Procurement Act of 1947, 62 Stat. 21. The House Committee on Armed Services in its report on the 1947 statute explained the reason behind granting this exception from competitive bidding for purchases of property intended for resale, stating:

> "Purchases for ships' stores, post exchanges, commissaries, and other similar operations are generally not made by specifications but by brand names, with a view toward accommodating the different tastes and demands of persons availing themselves of their facilities. Also, inasmuch as Government funds are not being used or are not subject to the hazards of business loss, the goods being all subject to resale, there is little need for

a requirement that purchases be affected by advertising procedures. It is quite necessary, on the other hand, to afford such activities the same leeway and discretion as privately owned and managed mercantile enterprises." House Report No. 109, 80th Congress, 1st Sess., p. 30.

Similarly, the Senate Committee on Armed Services stated:

"Purchases for ships' stores, and commissaries and other similar activities using appropriated funds are generally not made by specifications but by brand names, with a view toward accommodating the brand preferences of persons authorized to use such facilities. Therefore, the power to negotiate is required because of the proprietary nature of the articles." Senate Report No. 571, 80th Congress, 1st Sess., p. 7.

These committee reports show that by the exception commissary grocery stores were to be free to purchase by brand name without utilizing competitive bidding and were otherwise to be free from the advertising procedures because government funds "are not subject to the hazards of business loss, the goods being all subject to resale." House Report No. 109, 80th Congress, 1st Sess., p. 30. This avoidance of reliance on competitive bidding is illustrated by the commissary grocery store regulation which requires that "... a reasonable number of better known, nationally or locally established brands must be available." 43 636. In further implementation of this policy to pur-

chase by brand name, the milk purchase contract at Castle provided:

> "Notwithstanding General Provision 25 [R. 336], entitled "Estimated Requirements" the Government reserves the right to purchase brand name items from other manufacturers when required by customer demand for resale in the Commissary Sales Store." R. 320.

There is certainly no intention expressed here by Congress, by the congressional committees, or by the Secretary of Defense, that the contractor delivering milk to these commissary stores should be immunized from state milk stabilization regulation.

Since 1954, the annual statutes appropriating money to the Department of Defense have contained the restriction:

> "That no appropriation contained in this Act shall, after December 31, 1953, be available in connection with the operation of commissary stores within the continental United States unless the Secretary of Defense has certified that items normally procured from commissary stores are not otherwise available at a reasonable distance and a reasonable price in satisfactory quality and quantity to the military and civilian employees of the Department of Defense."

Department of Defense Appropriation Acts, 1954 to 1962, inclusive, 67 Stat. 353;[21] 68 Stat. 353; 69 Stat. 317; 70 Stat. 469-470; 71 Stat. 325-326; 72 Stat. 711; 73 Stat. 366; 74 Stat. 338; 75 Stat. 365. This restric-

[21] The appropriation statutes after 1954 deleted the words "after December 31, 1953" from the quoted provision.

tion was placed in the law by Congress at the request of the Senate Appropriation Committee for the reason that:

> "The committee fails to find any justification for the continuation of Government-operated sales commissaries at military installations which are surrounded by or which abut metropolitan areas. In such instances it appears that private enterprises are satisfactorily located and equipped to meet the requirements of military personnel now served by sales commissaries.
>
> "The committee also believes that at those military installations which are removed from metropolitan trading centers by longer distances, the operation of Government sales commissaries should also be curtailed. This could be accomplished by the negotiation of satisfactory arrangements with reliable sales organizations securing to the Government adequate rentals for buildings leased to such organizations and guaranteeing to the military personnel at such stations *that the prices charged would in no instance exceed those prevailing at the nearest metropolitan area*, ..." (emphasis added). Senate Report, No. 601, 83d Congress, 1st Sess., p. 8.

The quoted statutory restriction on the operation of commissary stores further negatives the assertion that Congress intended to immunize contractors with these commissary stores from the same state laws which regulate competing private grocery stores located in Oakland, California (Oakland Army Terminal, R. 639), in Merced, California (Castle Air Force Base,

R. 283), and in Fairfield, California (Travis Air Force Base, R. 821).* Further, any increase in costs of the commissary resulting from enforcement of the state stabilization act will not be reflected in an increased cost to the federal fisc. This is true because commissary officers are required to adjust "the sales prices in such commissary stores to the extent necessary to furnish sufficient gross revenue from sales of commissary stores to make such reimbursement." Sec. 613, Department of Defense Appropriation Act, 1962, 75 Stat. 365. Thus, patrons of commissary grocery stores will, along with the patrons of private super markets, share both the benefits of having available adequate quantities of wholesome milk, and the burden of paying a state regulated price.

It is apparent, therefore, that it was not the intention of Congress to exempt contractors delivering milk to commissaries from the obligation under state law to pay their dairy farmer suppliers the state established minimum producer prices, and to charge the established minimum wholesale prices.

* Congressman Carl Vinson, Georgia, Chairman of the House Armed Services Committee, stated in committee hearing:

"The whole theory of the commissary privilege—the whole theory of all of it was originally to give it to the people who were at isolated stations who did not have the benefit of metropolitan sales. That is the whole theory and the only justification of it. It was never intended that the Government should go in the business of providing for its personnel where they have the privilege and the opportunity to go to a private place and buy. It was intended on account of the remoteness of stations to accommodate them. It has grown now into a mammoth thing which has disturbed business and has disturbed the Congress." Print No. 106, Hearings, House Armed Services Committee, 1949-1950, p. 3815.

3. CONTRACTORS DELIVERING MILK FOR TROOP RATION ARE NOT IMMUNIZED FROM COMPLIANCE WITH LOCAL MILK STABILIZATION STATUTES.

In *Penn Dairies*, 318 U.S. 261, the Court held, notwithstanding the existing federal statutes authorizing the military services to purchase by bid or negotiated contract the articles of food needed for the armed services, that Pennsylvania could validly control the price at which a Pennsylvania contractor sold milk to the government for troop ration. The rationale of this and earlier decisions is that prices which are fixed by the state to protect the common welfare must necessarily be viewed in a more favorable light than prices which are fixed by combinations of private sellers who act without the safeguards of government control and publicity. See *Davies Warehouse Co.* v. *Bowles*, 321 U.S. 144 (1944); *Nebbia* v. *New York*, 291 U.S. 502 (1934); *Munn* v. *Illinois*, 94 U.S. 113 (1876). The Pennsylvania Milk Control Act considered in *Penn Dairies* is similar to the California act: *United States* v. *Wunderlich*, 190 F.Supp. 645. Similarly, the existing procurement statutes, 10 U.S.C. 2301-2314, are substantially the same as the procurement statutes considered in *Penn Dairies*. See legislative history set forth in the appendix at page 234.[23] Since both the state statutes and the federal statutes are substantially the same in this case as in *Penn Dairies*,

[23] The Armed Services Procurement Act of 1947, 62 Stat. 21, was a codification and revision of the prior procurement statutes. House Report, No. 109, 80th Congress, 1st Sess., p. 6. 10 U.S.C. 2301-2314, in turn, is a recodification, without a substantial change of the 1947 statute, 62 Stat. 21, formerly 41 U.S.C. 151-161.

the reasoning in this latter decision should be controlling precedent.

The draft of the proposed bill which became the Armed Services Procurement Act of 1947, had its genesis in the Procurement Policy Board of the War Production Board. This board was composed of representatives of the various contracting agencies of the government and contained the provision in question. House Report, No. 109, 80th Congress, 1st Sess., pp. 26-27; Hearings on H.R. 1366, before a House Subcommittee of the Committee on Armed Services, 80th Congress, 1st Sess., v. 1, pp. 423-433.

As drafted by the government, 10 U.S.C. 2304(a)(10), formerly Section 2(c)(10) of the Armed Services Procurement Act of 1947, 62 Stat. 21, authorizes negotiated purchasing of goods and services if:

> "10. The purchase or contract is for property or services for which it is impracticable to obtain competition."

At the Senate hearings on the bill, Kenneth C. Royall, Under-Secretary of War, testified:

> "As to the exception which deals with supplies or for which it is impracticable to secure competition, this language originally appeared in the Act of March 2, 1901 (31 Stat. 903; 10 U.S.C. 1201), and has been the subject of a number of highly restrictive administrative interpretations. In my opinion, this exception is intended to apply in at least these three situations:
>
> "1. . . .

"2. Where the price of the supply or service has been legally fixed.

"3. . . . ."

Hearing on H.R. 1366 before the Senate Committee on Armed Services, 80th Congress, 1st Sess., p. 15. In referring to procurement of supplies where the price "has been legally fixed," Under-Secretary of War Royall undoubtedly included the purchase of milk for troop issue where minimum prices had been established by state regulation, or where fixed by regulations promulgated by the Secretary of Agriculture pursuant to the Agricultural Marketing Agreement Act of 1937, 50 Stat. 246. *Penn Dairies, Inc. v. Milk Control Comm'n.*, 318 U.S. 261 (1943) state milk stabilization act; *In re Knudsen Brothers Dairy, Inc.*, 18 A.D. 1333, 1348 (1959); *In re Prairie Farms Creamery*, 17 A.D. 841, 843 (1958) federal milk marketing orders. This legislative history shows that Congress, in authorizing informal negotiation whenever the existence of state price fixing regulation made advertising and bidding unfeasible, intended not the fostering of competitive price wars between milk contractors with accompanying losses to dairy farmers and distributors, but the accommodation of milk procurement to the existing state milk stabilization acts.[24]

[24] Accommodation of federal procurement to state milk stabilization statutes is implemented by the awarding of bids by lot where all bids are at the state minimum wholesale price. R. 354, 846; 32 C.F.R. 2.406-4. See 32 C.F.R. 3.210-2(j) which authorizes procurement by negotiation where rates for stevedoring, terminal warehousing, and switching services are established by law or regulation.

Compare *Davies Warehouse Co.* v. *Bowles*, 321 U.S. 144, 151 (1944), state regulation of warehouses upheld under Emergency Price Control Act of 1942, 56 Stat. 23.

Had Congress (or the draftsman of the 1947 procurement act) intended to change the decision in *Penn Dairies*, it could easily have declared that competitive bidding for contracts should be unaffected by state regulation. Examples are not wanting which show that when Congress desires to change the statutory construction made by the Court, that it does so by specific provision, e.g., *Bindczyck* v. *Finucane*, 342 U.S. 76 (1951), changed by Nationality Act of 1940, 54 Stat. 1158, which restored power to revoke naturalization to state courts; *Power Comm'n.* v. *East Ohio Gas Co.*, 338 U.S. 464 (1950), changed by Act of March 27, 1954, 68 Stat. 36, to exempt state regulated distributors of natural gas from Federal Power Commission jurisdiction; *United States* v. *California*, 332 U.S. 19 (1947), changed by the Submerged Lands Act, 67 Stat. 29 (1953), which quit-claimed government's title in the submerged lands; *United States* v. *South-Eastern Underwriters Assn.*, 322 U.S. 533 (1944), changed by Act of March 3, 1945, 59 Stat. 23, which returned immunity to insurance industry from federal antitrust laws to the extent of state insurance regulation.

Because of its superior bargaining strength, and by reason of the economic instability in the dairy industry, the government has the power to drive the

price of fresh milk below the costs of production. R. 680-685. This bargaining advantage in the fall of 1960 and the spring of 1961 was used to force the dairy farmer prices from $5.19 per hundredweight to $2.75 per hundredweight for milk. R. 684. The construction adopted by the trial court that the procurement statutes override state police measures intended to safeguard the public supply of milk is squarely inconsistent with the expressed policy of Congress:

> "... to assure a stabilized annual production of adequate supplies of milk and dairy products; to promote the increased use of these essential foods; to improve the domestic source of supply of milk and butterfat by encouraging dairy farmers to develop efficient production units consisting of high-grade, disease-free cattle and modern sanitary equipment; and to stabilize the economy of dairy farmers at a level which will provide a fair return for their labor and investment when compared with the cost of things that farmers buy." (Agricultural Act of 1954, 68 Stat. 899.)

The defense departments use Treasury funds in purchasing fresh milk for troop ration, and an increase in price by the contractor due to state regulation would affect the appropriation to the armed services. Analysis shows, however, that this increase in cost will be minimal. The government in its memorandum in response to appellants' Jurisdictional Statement states that it "has concluded as a matter of

procurement policy not to assert immunity from these [state milk producer] minimum prices but to accede to full compliance with those requirements." Gov't. Br. p. 5. In the case of the Oakland Army Terminal, this means that contractors with the government will be required to pay the state established raw product price of 1.34¢ per quart. R. 399.[25] It is reasonable to assume that the contractor will add the cost of taxes, utilities, labor, containers, hauling, and overhead to his raw product costs in contracting with the government. This inference is supported by the expert opinion that with milk producer price stabilization, the costs to consumers of factors accounting for nearly 80 percent of the total retail price were fixed either by law (e.g., utility rates, taxes) or by collective bargaining contracts with labor unions. Tinley, Public Regulation of Milk Marketing in California, University of California Press, 1938, p. 78. Thus, the impact of the California wholesale milk price regulations on the United States Treasury would be measured by the difference between the contractors' costs (raw product, processing, hauling, overhead) and the state established wholesale price. The experience of contractors during the price war shows that this price differential would amount to 25 percent of the contractors' margin between the minimum milk pro-

[25] The regulation establishes the producer price in terms of the constituents of the milk, i.e., cents per pound milkfat, and skim milk per hundredweight. These prices have been converted to costs per quart. See method of calculation at R. 689.

ducer price, and the minimum wholesale price.[26] In the Oakland area, for example, this would amount to 1.87c per quart. R. 399-403, 420. Insofar as the armed services are concerned, this added increment is covered by the Commodity Credit Corporation subsidy of 8.12c per quart for milk issued over the basic 8 oz. ration. United States Dept. of Agriculture Bulletin 2179-61, July 12, 1961, Appendix p. 219. It can hardly be argued, therefore, that the wholesale price regulations impose a different or greater impairment of a federal function than the Pennsylvania wholesale milk price regulations which increased the price to the government 1.6c per quart (318 U.S. 261, 280) and which were sustained in *Penn Dairies, Inc.* v. *Milk Control Comm'n*, 318 U.S. 261 (1943); or the ad valorem tax on the contractors' possessory interests in government-owned material and equipment validated in *City of Detroit* v. *Murray Corp.*, 355 U.S. 489 (1958); or the state sales and use taxes imposed on materials used by a contractor on a cost-plus fixed fee contract upheld in *Alabama* v. *King & Boozer*, 314 U.S. 1 (1941) and in *Curry* v. *United States*, 314 U.S. 14 (1941); or the state licensing of a trucking company while performing its government contract to transport federal employees on a Public Works Administration project, approved in *Baltimore & A. R. Co.* v. *Lichtenberg*, 176 Md. 383, 4 A. 2d 734 (1939), appeal dis-

[26] By allocating capital, operating and overhead expenses properly allocable to costs incurred in performing federal contracts to consumer sales, contractors were able to pass onto the California consuming public about 25% of the drop in price on government sales. R. 683.

missed for want of a substantial federal question, 308 U.S. 525; or the local construction safety regulations applied to a builder-contractor constructing a post office building and sustained in *Stewart & Co. v. Sadrakula*, 309 U.S. 94 (1940).

It seems anomalous that the same United States which through Congress has stated its concern for the welfare of the dairy farmer (Sec. 204(a), Agricultural Act of 1954, 68 Stat. 899) should seek to nullify a state milk stabilization act with the same legislative objectives. *In re Willing*, 12 C. 2d 591, 594 (1939). Congress has granted protection to the employees of contractors by limiting their workday to eight hours (Act of Aug. 1, 1892, 27 Stat. 340), and requires such contractors to pay prevailing minimum wages. Act of March 3, 1931, 46 Stat. 1494; Walsh-Healey Act, 49 Stat. 2036). Federal procurement regulation requires that contractors with the government co-operate "to the fullest extent possible" with state agencies responsible for enforcing safety, health and sanitation, maximum hours, minimum wages, equal pay for women, child and convict labor laws. 32 C.F.R. 12.103. The effect of these working and wage statutes and regulations, serve to increase the cost of goods and services purchased by the government which presumes as a matter of procurement policy that all bids submitted were prepared in contemplation of such laws. 22 Comp. Gen. 265, Sept. 24, 1942. Therefore, the slight increase in procurement costs due to the exercise of milk price control

over the seller is but the normal incident of the operation within the same territory of a dual system of government. *Graves* v. *New York*, 306 U.S. 466, 483, 487 (1939). This increase in cost is justified since the state law insures a supply of quality milk in sufficient quantities which might otherwise be endangered due to economic forces peculiar to this industry. For the reasons stated, it is submitted that Congress did not intend to set aside the California milk stabilization act in order to secure for troop ration a lower price for milk than would otherwise be obtainable.

II. CALIFORNIA, BY VIRTUE OF ITS JURISDICTION OVER THE CASTLE, TRAVIS AND OAKLAND RESERVATIONS, MAY ENFORCE ITS WHOLESALE MILK PRICE REGULATIONS AGAINST CONTRACTORS DELIVERING MILK TO THESE INSTALLATIONS.

A. The Exercise of State Jurisdiction Over the Large Military Installations Within California Will Prevent State-Federal Conflict.

Sovereignty over the territory now comprising the State of California was ceded to California by the Congressional Enabling Act of September 9, 1850, 9 Stat. 452, which admitted California to the Union, there being no reservation of jurisdiction in said Enabling Act. See *United States* v. *Mission Rock Co.*, 189 U.S. 391, 404 (1903); *Weber* v. *State Harbor Commissioners*, 18 Wall. 57, 65-66, (1873). California, therefore, exercises jurisdiction over the 242 military

installations located on over 3,800,000 acres within the state borders, unless the State Legislature has ceded, and the government accepted, a retrocession of exclusive jurisdiction. R. 392. It is conceded, of course, that state jurisdiction can be exercised only in a manner which is consistent with governmental uses of these federal lands. *James* v. *Dravo Contracting Co.*, 302 U.S. 134, 147 (1937).

The question of the jurisdictional status of the Castle, Travis and Oakland installations arises in this case because of the government's assertion that California may not constitutionally apply its milk stabilization act to contractors making delivery of milk on parcels at these bases over which California has allegedly transferred exclusive jurisdiction to the United States. *Pacific Coast Dairy* v. *Dept.*, 318 U.S. 285 (1943). The claimed federal "exclusive jurisdiction" over the Castle, Travis and Oakland military reservations, and the related jurisdictional claims over the similarly situated remaining 239 military installations, constitutes a matter of extreme importance to the State of California, and to its citizens.[27] The issue goes far

[27] There are approximately 68,000 civilian residents, including military dependents, on military reservations in the three states of California, Kansas and Virginia. Jurisdiction Over Federal Areas Within the States, Part I, Gov't. Printing Office, 1956, pp. 84-96. No breakdown is given for each state, or for the entire United States. This report states that the residents of the naval installation at El Centro, California, an area of claimed exclusive federal jurisdiction, are denied access to the state probate courts, the services of visiting nurses, and access to state hospitals. Id. pp. 91-92.

beyond the applicability of state milk stabilization statutes as stated in a federal study:

> "The State no longer has the authority to enforce its criminal laws in areas under the exclusive jurisdiction of the United States. Privately owned property in such areas is beyond the taxing authority of the State. It has been generally held that residents of such areas are not residents of the State, and hence not only are not subject to the obligations of residents of the State but also are not entitled to any of the benefits and privileges conferred by the State upon its residents. Thus, residents of Federal enclaves usually cannot vote, serve on juries, or run for office. They do not, as a matter of right, have access to State schools, hospitals, mental institutions, or similar establishments. The acquisition of exclusive jurisdiction by the Federal Government renders unavailable to the residents of the affected areas the benefits of the laws and judicial and administrative processes of the State relating to adoption, the probate of wills and administration of estates, divorce, and many other matters. Police, fire-fighting, notarial, coroner, and similar services performed by or under the authority of a State may not be rendered with legal sanction, in the usual case, in a Federal enclave." (Jurisdiction Over Federal Areas Within the States, Part II, Gov't. Printing Office, 1957, p. 4.)

These harsh results may have been a necessary concomitant to the desire in the federal government in the early days of the Republic to claim exclusive jurisdiction over federally acquired property. However, the

tremendous expansion of federal functions which have occurred in the recent history of the United States, with a resultant increase in federal land holdings, has drastically altered conditions affecting the question of the exercise of state jurisdiction over federally owned land. These changed conditions show that the diverse problems arising from the existence of federally owned lands within a state cannot rationally be determined under mechanically applied rules of jurisdiction, but require resolution upon a consideration of all the relevant facts in order to determine if the matter is one which may be appropriately regulated by the states in the interests of the safety, health, and well-being of their citizens, without impairing the governmental uses of such federal installations. See *James v. Dravo Contracting Co.*, 302 U.S. 134, 148 (1937). Analysis of the relevant constitutional provisions and of the relevant state and federal statutes, when considered in the light of their contemporary application, require the conclusion that California exercises jurisdiction over the Castle, Travis and Oakland installations. This result would be consonant with the declared federal policy that: "With respect to the large bulk of federally owned or operated real property in the several states and outside of the District of Columbia it is desirable that the federal government not receive, or retain, any measure whatever of legislative jurisdiction, but that it hold the installations and areas in a proprietorial interest status only, with legislative jurisdiction remaining in the several states." Juris-

diction Over Federal Areas Within the States, Government Printing Office, 1956, Part I, page 70; see letter dated May 14, 1957, from the United States Deputy Attorney General to United States Senator Clair Engle set forth in House Report No. 624, 85th Cong., 2nd Sess., pp. 30-33.

B. California Exercises Jurisdiction Over the Castle Installation.

1. ACQUISITION HISTORY AT CASTLE.

Castle Air Force Base, totaling 2376 acres in area (R. 380), is located in Merced County, California. R. 383. The parcels comprising the base proper were acquired from private land owners by conveyance and by condemnation from June 20, 1946, to June 11, 1956. R. 352, 383-387. No claim is made by the government that it exercises jurisdiction over the base proper. Gov't. Br. 12-13. This concession is required since the base proper was acquired subsequent to the enactment of Section 126, and because the United States has made no application to the California State Lands Commission as required by Section 126 California Government Code. (Stats. 1st Ex. Sess. 1946, p. 199, eff. May 31, 1946.)[28] R. 644.

The United States does claim jurisdiction over parcel "A," a civilian housing tract of 18.36 acres which is located outside the main entrance gate at Castle and which was acquired July 17, 1943, by the government pursuant to the Lanham Act, 54 Stat. 1125. R. 229.

[28] Sec. 126 Calif. Gov. Code, Stats. 1st Ex. Sess. 1946, p. 199, is set forth in the appendix p. 204.

233, 349, 381, 490, 493. While the government asserts that title to parcel "A" was acquired by it on April 6, 1943, the court below "assumed" that title was acquired on July 17, 1943. R. 543, 547; 190 F. Supp. 645, 654. See infra pp. 116-117.

2. PROCUREMENT HISTORY AT CASTLE.

a. MILK PURCHASED WITH APPROPRIATED FUNDS

Prior to February 5, 1960, delivery of milk purchased for resale from appropriated funds was made to the Base Commissary and to mess kitchens located on Parcel 12 (part of the base proper) at Castle. R. 350-351, 642.

State officers on February 5, 1960, filed suit in the state court to enforce the California milk stabilization act against the contractor delivering milk to Castle. R. 790. Ten days later, on February 15, 1960, for the reason that California concededly exercises jurisdiction over Parcel 12, the government directed the contractor to cease making delivery to Parcel 12 and to commence making delivery to Parcel "A," the 18.36 acre civilian housing tract. R. 350, 363, 385, 642. Delivery to Parcel "A" was accomplished by the contractor leaving a loaded refrigerated trailer on a vacant lot on Parcel 12. R. 350, 363, 385, 642. Air force personnel, using a government tractor, then hauled the trailer onto the base proper where the milk was unloaded at buildings located on Parcel 12. R. 350-351, 642.

To say the least, the government here changed its pattern of acceptance of delivery of milk in an attempt

to clothe its contractor with immunity from the State milk stabilization act. This is not an isolated example, but was repeated at the Travis Air Force Base where deliveries of milk were originally accepted at Dining Halls No. 6 and 7, and at Building 381 on Parcel 49. R. 819. Thereafter, it was evidently ascertained that Parcel 49 was acquired (May 26, 1946; R. 806) just four days prior to the enactment of Section 126, California Government Code (eff. May 31, 1946, Stats. 1st Ex. Sess. 1946, p. 199), that no application for state consent to the purchase of land at Travis had ever been made to the California State Lands Commission pursuant to Section 126 (R. 544, 548, 644), and that Parcel 49, therefore, lay within state jurisdiction. Thereupon, as at Castle, the government discontinued receipt of delivery of milk on Parcel 49 at Travis. R. 544, 548, 819, 821.

The government in this court argues that the sales of milk, including sales at Castle, "were consummated on lands under the exclusive jurisdiction of the federal government." (Gov't. Br., p. 4.) The government fails to state that the contracting officer at Castle lacks authority to execute purchase contracts for amounts in excess of $25,000. R. 248, 272. Since the milk purchase contracts at Castle far exceeded this sum (e.g. $459,906.00; R. 251), the offers of sale were accepted in writing by higher military authority not located at Castle. R. 248. The "sale," in the sense that the property interest in the milk was to be subsequently transferred to the govern-

ment by virtue of the contract, therefore, did not take place on Parcel A, or at the base procurement office located on the base proper. *United States* v. *Parcell Envelope Co.*, 249 U.S. 313, 319-32 (1919); *Garfielde* v. *United States*, 3 Otto 242, 243 (1876).

The situation then, is that milk produced on dairy farms located within state jurisdiction is purchased and processed by the contractor within state jurisdiction. This milk is then resold by the contractor to the government in a sales transaction not occurring at Castle, and is delivered to a civilian housing tract outside the installation *en passant* to Parcel 12 located within state jurisdiction where the milk is to be resold through the commissary store and issued in troop ration. The violations of the state milk stabilization act by the contractor in question violates state public policy, and California as a sovereign state should be constitutionally entitled to forbid this conduct occurring within its borders, even though such action may have repercussions on the 18.36 acre housing tract which is claimed to lie within exclusive federal jurisdiction. See *Osborn* v. *Ogden*, 310 U.S. 53, 62-63 (1940); *Alaska Packers Ass'n.* v. *Comm.*, 294 U.S. 532, 541 (1935); *Skiriotes* v. *Florida*, 313 U.S. 69, 76-79 (1941).

b. Milk Purchased With Nonappropriated Funds

Milk purchased with nonappropriated funds is delivered to Parcel 12 at Castle for resale at the Post Exchange, Officers' Club and the Non-Commissioned Officers' Open Mess. R. 643. Parcel 12 lies within state

jurisdiction since the government has never made application to acquire jurisdiction over Castle to the California State Lands Commission as required by Section 126, California Government Code, R. 644. Since deliveries of milk to the Post Exchange, Officers' Club and the Non-Commissioned Officers' Open Mess occurred on land within conceded state jurisdiction, California can constitutionally enforce its milk stabilization act against contractors delivering milk to the activities. *Pacific Coast Dairy, Inc. v. Dept. of Agriculture*, 318 U.S. 285 (1943).

2. THE CALIFORNIA LEGISLATURE IN GRANTING STATE CONSENT TO THE FEDERAL PURCHASE OF LAND FOR MILITARY PURPOSES INTENDED TO SATISFY A REQUIREMENT OF CONGRESS AND DID NOT INTEND TO TRANSFER EXCLUSIVE JURISDICTION TO THE UNITED STATES.

The trial court assumed "without deciding" that title to Parcel A at Castle had been conveyed to the United States effective July 17, 1943. 190 F. Supp. 645, 654. It further found that exclusive jurisdiction over Parcel A was transferred to the United States under Political Code, Section 34, as amended, as of January 3, 1944, by virtue of the blanket notice of acceptance of jurisdiction given on that date. R. 639; 190 F. Supp. 645, 654.

1872 Political Code, Section 34, as originally provided in relevant part:

> "The Legislature consents to the purchase or condemnation by the United States of any tract of land within this State for the purpose of erecting forts,

The text of the [illegible] dated January 3, 1944, is set forth in the appendix at p. 222.

magazines, arsenals, dockyards, and other needful buildings, . . ."[30]

The remaining provisions of Section 34 reserved the state powers of taxation, and the right to serve process on the land so purchased or condemned. In addition, the statute reserved the state's power of taxation "with respect to any tract or land over which any jurisdiction is ceded or granted by the State to the United States," thus clearly implying that Political Code, Section 34, did not itself cede or grant jurisdiction to the United States. Stats. 1939, Ch. 710, p. 2231.

Technically, Section 34 had been repealed the previous August 4, 1943 (Stats. 1943, Ch. 134, p. 1009) and, therefore, was not in force when Parcel A was acquired on July 17, 1943. Its provisions, though, were continued in force by the enactment of Government Code, Section 111 (Stats. 1943, Ch. 134, p. 898, eff. Aug. 4, 1943) which provided:

> "The Legislature consents to the purchase or condemnation by the United States of any tract of land within the State for the purpose of erecting forts, magazines, arsenals, dockyards, and other needful buildings, reserving the authority to serve and execute process and the State's entire power of taxation as provided in this article."

1872 Political Code, Section 34, was enacted to satisfy the congressional requirement in effect from 1841 to 1940 "that no public money shall be expended upon

[30] The text of Political Code, Section 34, as enacted in 1872 and as amended Stats. 1939, Ch. 710, p. 2231, are set out in the appendix at pp. 203, 204.

any site or land hereafter to be purchased by the United States" for military purposes until the Attorney General approves the validity of title and until "the consent of the Legislature of the State in which the land or site may be shall be given to said purchases." Section 3, Joint Resolution of September 11, 1841, 5 Stat. 468, codified as Section 355, 1875 Revised Statutes, repealed Act of February 1, 1940, 54 Stat. 19.[2] This provision was read by the Comptroller General to mean that federal funds could be used to purchase land without state consent, but could not be used to improve such lands unless state consent to the purchase were given. 3 Comp. Decs. Treasury 530 (1897). It is clear that Section 3 was to be read literally to require only a state consent, and not a state cession of jurisdiction, since Section 6 of the resolution dealt with cessions. Under Section 6, the heads of federal agencies were directed to apply to the states for cession of jurisdiction over lands under their administration. If cession were refused, the agency heads were to report the refusal to Congress.[3] Great importance was evidently attached by Congress to the securing of

[1] The Joint Resolution of September 11, 1841, 5 Stat. 468 and R.S. sec. 355, are set forth in the Appendix at pp. 170-172.

[2] Section 6, Joint Resolution of September 11, 1841, 5 Stat. 468, was not carried over into R.S. sec. 355, as was section 3. Congress made express statutory provision when it desired that a state cede jurisdiction over federally-owned property to the government. Act of May 20, 1826, 4 Stat. 178 (arsenal); see acts appropriating monies for post office buildings: Acts of April 29, 1878, 20 Stat. 39; May 28, 1882, 22 Stat. 93-96; January 13, 1885, 23 Stat. 282; March 3, 1887, 24 Stat. 544; August 21, 1888, 25 Stat. 444; January 21, 1891, 26 Stat. 722; January 21, 1891, 26 Stat. 723; January 21, 1891, 26 Stat. 724; January 21, 1891, 26 Stat. 725; January 24, 1891, 26 Stat. 727.

state consent to purchase, since federal expenditures were prohibited unless such consent were given." No such restriction on funds applied if state cession of jurisdiction were refused.

The Congressional Record gives no indication of the reasons prompting the enactment of this joint resolution. A federal 1957 report suggests that the dual requirements that the Attorney General approve title and that the state consent to the government's purchase of land arose from a controversy between the United States and the State of New York over title to a tract of land on Staten Island upon which fortifications had been maintained at federal expense. Congressional Globe, 27th Congress, 1st Session, pp. 121, 123, 140. The report concluded that by this resolution "Congress presumably sought to avoid a repetition of the Staten Island incident, and to avoid all conflict with states over title to land." Jurisdiction Over Federal Areas Within The States, Government Printing Office, 1957, Part II, pp. 32-33.

This restriction on the spending of appropriated money unless a state consented to the purchase of the land was interpreted by the Department of Justice as prohibiting the expenditure of any money unless a state ceded exclusive jurisdiction to the United States over such land. 3 Ops. Att'y Gen. 240 (1838); 3 Ops. Att'y Gen. 261 (1838); 3 Ops. Att'y Gen. 282 (1838); 8 Ops. Att'y Gen. 241 (1856). The legislative history behind the government's building of the projects there involved includes the states' unlimited cession of jurisdiction to the United States under the decisions in *Van Brocklen v. Anderson*, 1 Cranch 253, 267 (1803), and *Fort Leavenworth R. Co. v. Lowe*, 114 U.S. 525, 541 (1885). This impasse caused by a misreading of congressional intent was corrected by the 1940 repeal of the requirement. Act of February 1, 1940, 54 Stat. 19. See House Report No. 1329, 76th Cong., 1st Ses., p. 2.

It is noted that the resolution followed the language of earlier statutes, and similar requirements have been subsequently enacted by Congress. Act of April 2, 1794, 1 Stat. 352 (arsenals); the Act of May 20, 1826, 4 Stat. 178 (arsenal); see also Sec. 7, 1911 Weeks Forestry Act, 36 Stat. 963 (forest lands); Sec. 7, Act of February 18, 1929, 45 Stat. 1222 (migratory bird refuge); see Sec. 2(d), Act of August 21, 1935, 49 Stat. 668 (historic sites). In each of the cited instances the Congress insured, by requiring state consent, that the federal project was welcomed by the people in the state affected.

Political Code, Section 34 (Government Code Section 111) was not cast in the form of a cession of jurisdiction, but instead, granted state consent to the federal purchase of land for military purposes. It is therefore similar to 1927 Acts of Arkansas, Act 108, page 302, which granted "consent of the State of Arkansas . . . to the acquisition by the United States by purchase" of land within state borders for federal forest purposes. And, like the California enactment, the 1927 Arkansas statute reserved jurisdiction to serve process on such lands. The Court in Howard v. Gipsy, 327 U.S. 174, 186 (1946), in an opinion by Mr. Chief Justice Stone, held that the Arkansas statute

> "... made no express grant or reservation of legislative power over the areas purchased. Hence the statute cannot be taken as having yielded as to

1927 Acts of Arkansas, Act 108, page 302 is set out in the appendix at pp. 225-226.

tendency to surrender to the Federal Government the state legislative jurisdiction over the area in question so far as exercise of that jurisdiction is inconsistent with federal finding.

The decision in the case was that Arkansas retained jurisdiction over the federal forest lands within the state, and that it could constitutionally apply a sales tax to timber severed from such lands by federal contractors.*

The Constitution that [illegible] Article III, Section 2 [illegible] with state jurisdiction [illegible] the state [illegible] state [illegible] [illegible] [illegible]

zcuta, 281 U.S. 138, 142 (1930). However, in each of the cited cases the Court was careful to point out that the state statute was in the form of a cession of jurisdiction. Thus, in the *Fort Leavenworth* case, the Kansas statute stated:

> "That exclusive jurisdiction be, and the same is hereby ceded to the United States over and within all the territory owned by the United States, and included within the limits of the United States military reservation known as the Fort Leavenworth Reservation . . . ." 114 U.S. 525, 528; 1875 Laws of Kansas, p. 95.

Similarly in *United States* v. *Unzeuta*, 281 U.S. 138, 141, Laws of Nebraska, 1887, page 628, read in part:

> "That the jurisdiction of the State of Nebraska in and over the military reservation known as . . . Fort Robinson be and the same are hereby ceded to the United States."

In *Surplus Trading Co.* v. *Cook*, 281 U.S. 647, 656-657, Arkansas Acts of 1903, page 346, provided in part:

> "The State of Arkansas hereby consents to the purchase . . . by the United States, of any site or ground for the erection of any armory, arsenal, fort, fortification, navy yard, custom house, light house, lock, dam, fish hatcheries, or other public buildings of any kind whatever, and the jurisdiction of this State, within and over all grounds thus purchased by the United States . . . is hereby ceded to the United States."

The Court, therefore, in the *Fort Leavenworth* and *Unzeuta* opinions had before it statutes cast in the form of express cessions of jurisdiction, and in *Surplus Trading Co.* had before it a statute which both consented to the federal acquisition of land, *and* which expressly ceded jurisdiction to the United States over the land so purchased. The general language in these opinions that state legislative consent to the federal purchase of land cedes exclusive jurisdiction to the government, therefore, must be taken to refer to statutes cast in the form of express cessions of jurisdiction and not to statutes granting consent to purchase only.[37]

And, where a state, in an express cession statute, makes a transfer of exclusive jurisdiction to the United States, the cession occurs because of the state action and not because of the operation of Article I,

[37] The briefs filed by the parties in *Pacific Coast Dairy* v. *Dept.*, 315 U.S. 285 (1943) and in *Howard* v. *Commr's of Louisville*, 344 U.S. 624 (1953) show that the parties assumed, *without argument*, that the land involved lay within exclusive federal jurisdiction. In both cases the plaintiffs' complaint in the trial court alleged that the state had ceded exclusive jurisdiction to the United States, and in both cases the defendants filed demurrers which admitted this allegation provisionally for the purpose of testing the question of law involved. Brief for Appellees, *Pacific Coast Dairy* v. *Dept.*, Supreme Court of the United States, Oct. Term, 1942, No. 275, p. 3; Brief for Appellees, *Howard* v. *Commr's of Louisville*, Supreme Court of the United States, Oct. Term, 1952, No. 295, pp. 3-5. As said by Mr. Justice Sutherland in *Webster* v. *Fall*, 266 U.S. 507, 511 (1925): "The most that can be said is that the point was in the cases if any one had seen fit to raise it. Questions which merely lurk in the record, neither brought to the attention of the Court nor ruled upon, are not to be considered as having been so decided as to constitute precedents."

Section 8, clause 17, of the Constitution. *Standard Oil Co. v. California*, 291 U.S. 242, 244 (1934).

The trial court cited no judicial authority in support of its holding that either Section 34 or Section 111, ceded exclusive jurisdiction over Castle to the United States. 190 F. Supp. 645, 654. In contrast, the district court placed its sole reliance on a report of a previous California Attorney General, Jurisdiction Over Federal Enclaves in California, Calif. Dept. of Justice, 1958, pp. 3, 42, 72-73. 190 F. Supp. 645, 654. This report at pages 3 and 4 cites *Fort Leavenworth R.R. Co. v. Lowe*, 114 U.S. 525, in support of its holding that California Political Code, Section 34 (predecessor to Gov. Code Sec. 111) effected a cession of exclusive jurisdiction, and on pages 72 and 73[a] cites only the opinion of the former California Attorney General in 23 Ops. Cal. Atty. Gen. 14 (1954). This opinion in 23 Ops. Cal. Atty. Gen. 14, erroneously relied on *Surplus Trading Co. v. Cook*, 281 U.S. 647 (1930), for its conclusion that Political Code, Section 34, made a cession of jurisdiction. As noted above, the state statutes before the court in the *Fort Leavenworth* and *Surplus Trading* cases were express cession statutes, and, therefore, these decisions are not relevant in determining the legal effect of Section 34, which contained no words of cession. Further, the then California Attorney General in 23 Ops. Cal. Atty. Gen. 14, 21, carefully qualified his conclusions saying

[a] This issue is not discussed on page 3. Page 11 of this report states that the California consent and cession statutes have "chaotic redundancy."

"We have not been requested to determine the nature and extent of jurisdiction over Fort Ord. We reserve opinion and comment as to the nature and extent of jurisdiction over this area and over other military enclaves in this State until specific factual situations giving rise to jurisdictional problems have been submitted to us for solution." The statement in the opinion construing Political Code, Section 34, is therefore *obiter dictum*.

It follows that the trial court erred in holding that Political Code, Section 34 (as codified into Gov. Code Sec. 113), transferred jurisdiction over Parcel A at Castle to the United States since neither Political Code, Section 34, nor Government Code, Section 111, was cast in the form of a cession of jurisdiction and, therefore, neither statute was intended to, nor did they transfer jurisdiction over Parcel A to the United States.

4. ARTICLE I, SECTION 8, CLAUSE 17, IS NOT PER SE EXCLUSORY OF LOCAL LAW.

The preceding discussion demonstrates that Government Code, Section 111, was not intended to effect a cession of exclusive jurisdiction over Parcel A at Castle. Section 111, by granting the state's ". . . consent to the purchase or condemnation by the United States of any tract of land within this State . . .", brought such tracts within the congressional power to exercise exclusive legislation over them. Yet this power is effective to displace local law only as Congress chooses to exercise it.

Article I, Section 8, provides in part:

> "The Congress shall have power . . . [17] . . . To exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular States, and the acceptance of Congress, become the seat of the government of the United States, and to exercise like authority over all places purchased by the consent of the Legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings; . . ."

The genesis of Article I, Section 8, clause 17, is to be found in the proposal submitted to the Constitutional Convention on September 5, 1787, by the Committee of Eleven, to whom the earlier proposals of Madison and Pickney had been referred. The original draft proposed that Congress be granted power:

> "To exercise exclusive legislation in all cases whatsoever over such district (not exceeding ten miles square) as may by cession of particular states and the acceptance of the legislature become the seat of Government by the U[illegible] S[illegible] and to exercise like authority over all places purchased for the erection of Forts, Magazines, Arsenals, Dock-Yards, and other needful buildings." Debates on the Confederation and Constitution, Elliott, Vol. 5, pp. 510-511; The Records of the Federal Convention, Farrand, Vol. 2, p. 509.

In debate on the convention floor, Massachusetts delegate Elbridge Geary raised objection to the provision giving Congress authority to exercise the power

of exclusive legislation over federal forts and arsenals. The substance of the debate was reported by Madison, as follows:

> "Mr. Geary contended that this power might be made use of to enclave any particular state by buying up its territory, and that the strongholds proposed would be a means of owing the state into an undue obedience to the general government.
>
> "Mr. King thought himself the provision unnecessary, the power being already involved; but would move to insert, after the word 'purchased,' the words 'by the consent of the Legislature of the State in which the same shall be.'" Elliot, op. cit., pp. 511-512; Farrand, op. cit., p. 510.

This court undoubtedly had reference to both the constitutional language of Article I, and to these debates, in asserting that: "It would seem to have been the opinion of the framers of the Constitution that, without the consent of the states, the new government would not be able to acquire lands within them: . . ." *Fort Leavenworth R.R. Co.* v. *Lowe*, 114 U.S. 525, 530 (1885).[*] Therefore, there is no question

[*] In *Kohl* v. *United States*, 1 Otto 367 (1876), the court held that the government possessed the power of eminent domain by virtue of its sovereignty under the Constitution. In the act appropriating money for the purchase of land for a post office at Cincinnati, Ohio, Congress conditioned the spending of the appropriation upon the state's making a cession of jurisdiction. Act of March 12, 1872, 17 Stat. 39. In response, the Ohio Legislature consented to the federal purchase of land for a post office site, and expressly made a cession of jurisdiction over the property so purchased to the United States. Act of April 20, 1872, 69 Ohio Laws 81. The court, therefore, in *Kohl*, did not have before it the question of the interpretation of Article I, Section 8, clause 17, posed in this instant case.

but that the requirement for state consent was added simply to foreclose the possibility that a state might be politically subjugated by the location of powerful federal "strongholds" within state borders and was not intended to secure cessions of exclusive jurisdiction.

Thus, the power in Congress to legislate under clause 17 is to be distinguished from a cession of exclusive jurisdiction which may or may not come within clause 17. For example, the cession of exclusive jurisdiction by Maryland over the District of Columbia (Act of December 23, 1788, Kilty's Laws of Md., Ch. 46; Act of December 19, 1791, 1791 Laws of Maryland, Ch. 55); and the acceptance by Congress (Act of July 16, 1790, 1 Stat. 130; Act of February 27, 1901, 2 Stat. 103) has been treated as coming within clause 17 (*District of Columbia* v. *Thompson Co.*, 346 U.S. 100, 105-109 (1953)), while cessions of exclusive jurisdiction over land purchased for park purposes (*Collins* v. *Yosemite Park Co.*, 304 U.S. 518, 529 (1938)) and of exclusive jurisdiction over land acquired by treaty before the state was admitted to the Union (*Benson* v. *United States*, 146 U.S. 325, 330 (1892)) was held not to come within clause 17. Of course one reason for the difference in treatment is that clause 17 requires a "cession of particular States" as a condition to the establishing of the seat of government while forts and arsenals must be purchased by the consent of the state in which the land is located. A cession of exclusive jurisdiction has been held to deprive persons living in

such areas of the rights of residency in the state. *Stultz v. Reese*, 19 Ohio St. 306, 316 (1869), cited with approval in *Fort Leavenworth R.R. Co. v. Lowe*, 114 U.S. 525, 536 (1885); *State v. Willett*, 117 Tenn. 334, 97 S.W. 299 (1906). It has been held to deprive residents of such an area of the right to send their children to the public schools. *Schwartz v. O'Hara Township School Dist.*, 375 Pa. 440, 449, 100 A. 2d 621 (1953); Opinion of the Justices, 42 Mass. 580 (1841), and of the right to sue for divorce in the state courts. *Lowe v. Lowe*, 150 Md. 592, 133 Atl. 729 (1926). It cannot be believed that the Constitutional Convention intended that the power to legislate was to be the equivalent of a cession of exclusive jurisdiction with the consequences such as these.

In deed, Congress has recognized that this power of legislation is not *per se* pre-emptive by leaving state jurisdiction intact in those instances where the clause 17 powers have been exercised. For example, section 11(b) of the Act of July 7, 1958, 72 Stat. 347, which granted statehood to Alaska reserved to the United States "the power of exclusive legislation", under clause 17 over military tracts of land owned by the government by virtue either of cession from Russia under the Treaty of March 31, 1867, 15 Stat. 539, or because of purchase or condemnation from private land owners. Express provision was made, though, that this reservation of authority should not operate to prevent the State from exercising concurrently with the government "any jurisdiction whatever which it would

have in the absence of such reservation of authority." In sharp contrast, section 10 of the statute reserved "exclusive jurisdiction" for the United States over "special national defense withdrawals" to be established by the President in which the government was to have "sole legislative, judicial and executive power." See House Report No. 624, 85th Cong., 2nd Sess., pp. 22-23, 30-33.

Similar provisions are set forth in Section 16(b) of the Act of March 18, 1959, 73 Stat. 11-12, which admitted Hawaii into the Union. Under Subsection 16(b) the Congress reserved authority to exercise the "power of exclusive legislation" under Clause 17 with provision for concurrent state jurisdiction, over military parcels owned by virtue of either cession from the Republic of Hawaii under the Joint Resolution of July 7, 1898, 30 Stat. 750, or because of purchase or condemnation from private land owners. "Sole and exclusive jurisdiction" in the United States was continued over such military installations as are determined by the President to be "critical areas." See Senate Report No. 80, 86th Cong., 1st Sess., p. 20. Similarly, the Act of February 23, 1927, 44 Stat. 1176, retroceded "jurisdiction and sovereignty" over a tract of land in the District of Columbia to the State of Virginia, but reserved the power to "exercise exclusive legislation" over the area while in the government's possession.

The Act of March 4, 1909, 35 Stat. 1088, 1143, now 18 U.S.C. 7(3), extended the criminal jurisdiction of

the federal courts to include offenses committed on "any place purchased or otherwise acquired by the United States, by consent of the legislature of the state in which the same shall be, for the erection of a fort, magazine, arsenal, dockyard, or other needful building." The enactment of this statute was an idle act if a state's consent to the federal purchase of land effected a cession of exclusive jurisdiction since the federal courts since 1790 had exercised criminal jurisdiction over offenses committed on areas within "exclusive federal jurisdiction." Act of April 30, 1790, 1 Stat. 113, 116.[7]

The legislative power in Congress, under Clause 17, has been treated the same as its powers under Article IV, Section 3, Clause 2, which authorizes needful rules and regulations respecting "the territory or other property belonging to the United States . . ." *District of Columbia v. Thompson Co.*, 346 U.S. 100, 105-106 (1953).

It would be a strange result if, of the supremacy powers given Congress in Article I, Section 8, and Article VI, Section 2, it was held that one, and only one, was *pro se* exclusory of state law in every case where there was an opportunity to exercise it. Clause

[7] It is arguable that the United States Attorney General should have read this grant of federal judicial jurisdiction right out of existence by omitting the phrase "any place purchased or otherwise acquired . . . by consent of the legislature of the State in which the same shall be" in the 1790 statute, the phrase "exclusive jurisdiction of the United States" in the 1790 statute, Act of March 4, 1909, 35 Stat. 1088, 1145, Act of April 30, 1790, 1 Stat. 113, 116, for the United States. *Williams v. United States*, Supreme Court of the United States, Oct. Term, 1949, No. 889, p. 6, fn. 3.

17 should in this regard be read literally and in the manner in which the Commerce Clause in Section 8 is read. *Parker* v. *Brown*, 317 U.S. 341, 361-363 (1943). So read, the provision that "The Congress shall have power . . . to exercise like authority [exclusive legislation] over all places purchased by the consent of the legislature . . ." Means that this power is effective to displace local law over military installations only if Congress chooses to avail of it. If a state's grant to Congress of the power "to exercise exclusive legislation" under clause 17 ousts state jurisdiction over the parcel involved, then any attempted reservation of state jurisdiction in a state statute granting consent to the federal purchase of land for military purposes would be ineffective under the Supremacy Clause of the Constitution. But in *James* v. *Dravo Contracting Co.*, 302 U.S. 134, 146-149 (1937), it was squarely held that such a reservation of state jurisdiction was effective. It follows that the power in Congress "to exercise exclusive legislation" over federally-owned land does not itself exclude state law or oust state jurisdiction over such land.

Of course, this grant of legislative authority to Congress under Constitution Article I, Section 8, clause 17, is cumulative to the other grants of power to Congress. Thus, Congress has ample authority to acquire land under the Commerce and War Clauses without state consent. Const. Art. I, Sec. 8, cl. 3 and 11-16; *United States* v. *Cormack*, 329 U.S. 230, 237 (1946), post office; *Oklahoma* v. *Atkinson Co.*, 313 U.S. 508.

534 (1941), reservoir; see *Ashwander* v. *Valley Authority*, 297 U.S. 288, 326-330 (1956), construction of a dam. Further, the authority to pre-empt the application of state law to federally-owned land is found in the power to "make all needful rules and regulations respecting the territory . . . belonging to the United States." Const. Art. IV, Sec. 3, cl. 2. *Utah Power & Light Co.* v. *United States*, 243 U.S. 389, 405 (1917); *Camfield* v. *United States*, 167 U.S. 518, 525-526 (1897).

For the reasons stated, it is submitted that the power in Congress under clause 17 to legislatively control land purchased with state consent has not deprived California of jurisdiction over Parcel A at Castle where Congress has not chosen to exercise this power.

5 THE SUBSEQUENT (1897) CALIFORNIA CESSION STATUTE QUALIFIED THE EARLIER (1872) CONSENT STATUTE, AND BY FAILING TO RECORD LAND DESCRIPTIONS AS REQUIRED BY THE 1897 STATUTE, THE UNITED STATES DID NOT ACQUIRE JURISDICTION AT CASTLE.

The Court may find, contrary to state officers' position, that a state's *unqualified* consent to the United States' purchase of land for military purposes results in a transfer of jurisdiction when the land is purchased by the government by reason of the pre-emptive effect of Constitution Article I, Section 8, clause 17. Such is not the case here, because the legislative consent in Political Code, Section 34 (Government Code, Section 111), was *qualified* by Statutes of 1897, Chapter 56, page 51 (Government Code, Section 114).

Admittedly, the United States failed to file land descriptions and Plats of Parcel A at Castle with the County Recorder of Merced County as required by the 1897 statute (Government Code, Section 114). R. 695, 700, 814. These filing requirements constitute a condition precedent to the transfer of sovereignty. *United States* v. *Watkins* (D.C.N.D. Calif. 1927), 22 F. 2d 437, 440; *Pothier* v. *Rodman* (C.A. 1), 291 Fed. 311, 319-321, rev'd. on other grounds, 264 U.S. 399 (1924); *Valley County* v. *Thomas*, 109 Mont. 343, 97 P. 2d 345, 360 (1939); *State* v. *Mendez*, 57 Nev. 192, 61 P. 2d 300, 303 (1936); *Six Companies* v. *DeVinney*, D.C.D.N., 2 F. Supp. 693, 699 (1933).

Political Code, Section 34 (Section 111) and the 1897 statute (Section 114) on January 3, 1944, the date of the government's notice of acceptance of jurisdiction (R. 320), provided:

> "111. The Legislature consents to the purchase or condemnation by the United States of any tract of land within the State for the purpose of erecting forts, magazines, arsenals, dockyards, and other needful buildings, reserving the authority to serve and execute process and the State's entire power of taxation as provided in this article." Stats. 1943, Ch. 134, p. 898; based on 1872 Political Code, section 34, as amended Stats. 1939, Ch. 710, p. 2231.
>
> "114. The State cedes to the United States exclusive jurisdiction over all lands within the State, held, occupied, or reserved on March 2, 1897 by the United States for military purposes or defense, and over all land which thereafter has

been or which may be ceded or conveyed to the United States for such purposes reserving the authority to serve and execute process, and the State's entire power of taxation. A sufficient description by metes and bounds and a map or plat of the lands shall first be filed in the proper office of record in the county in which the lands are situated." Stats. 1943, Ch. 134, p. 898; based on Stats. 1897, Ch. 56, p. 51.

The 1897 statute (Section 114) clearly includes lands "purchased" by the United States at Castle under Political Code, Section 34 (Section 111). "Ceded" in the 1897 statute (Section 114) referred to lands in California to which title was acquired from Mexico under the 1848 Treaty of Guadalupe Hidalgo, 9 Stat. 922, and which were in the federal public domain when California was admitted to the Union, Act of September 9, 1850, 9 Stat. 452. On the other hand, "conveyed" in the 1897 statute (Section 114) imports a purchase of land from a private landowner, i.e., refers to a transfer of legal title to land. See *Seal of Gold Mining Co. v. Slater*, 161 Cal. 621, 630, 120 Pac. 15 (1911). Since the requirement that land descriptions be filed was enacted in 1897 (Stats. 1897, Ch. 56, p. 51), it is clear that it qualifies the earlier consent language in Section 111, first enacted in 1872 Political Code, Section 34.

The fact that both the 1872 and 1897 statutes were codified into the Government Code at the same time in 1943 (Stats. 1943, Ch. 134, pp. 898, 899) did not alter the then existing relation between the two stat

utes, namely the qualification of the 1872 statute by the 1897 statute and hence the continuing qualification of Government Code, Section 111, by Government Code, Section 114. Sections 111 and 114 in this respect are similar to the 1931 West Virginia statute considered in *James* v. *Dravo Contracting Co.*, 302 U.S. 134 (1937). This statute (Sec. 3, Ch. 1, Art. 1, 1931 Code of West Virginia) provided in relevant part:

> "Sec. 3. *Acquisition of Lands by United States; Jurisdiction.* The consent of this state is hereby given to the acquisition by the United States, or under its authority, by purchase, lease, condemnation, or otherwise, of any land acquired, or to be acquired in this State by the United States, from any individual, body politic or corporate, for sites for lighthouses, beacons, signal stations, post offices, customhouses, courthouses, arsenals, soldiers' homes, cemeteries, locks, dams, armor plate manufacturing plants, projectile factories or factories of any kind or character, or any needful buildings or structures or proving grounds, or works for the improvement of the navigation of any watercourse, or work of public improvement whatever, or for the conservation of the forests, or for any other purpose for which the same may be needed or required by the government of the United States. The evidence of title to such land shall be recorded as in other cases." [Based on Sec. 4, Ch. 20, p. 265, 1881 Acts of West Virginia].
>
> "Concurrent jurisdiction with this State in and over any land so acquired by the United States shall be, and the same is hereby, ceded to the

United States for all purposes: . . ." [Based on Sec. 2, 1909 Acts of W. Virginia, Ch. 61, p. 494].

In its brief in *Draco*, the government argued that the consent granted by the first quoted paragraph ". . . apparently transfers exclusive jurisdiction to the United States," and that the second quoted paragraph ". . . was a separate enactment of a statute *ceding* jurisdiction, independently of Clause 17, and not as a qualification to the consent statute." Brief for the United States, Supreme Court of the United States, Oct. Term, 1937, Nos. 3, 7, 8, pp. 54, 60.

The court never reached the first contention, since it held that the phrase "any land so acquired" in the second quoted paragraph manifestly covered lands acquired by the United States with the state's consent granted in the first paragraph, and that the reservation of concurrent jurisdiction in the second quoted paragraph was controlling. *James* v. *Draco Contracting Co.*, 302 U.S. 134, 145-146. This reasoning should be dispositive of the instant case. Just as the phrase "land so acquired" was held to include lands purchased under the consent language in the West Virginia statute, so also the provision in Section 114 "all land . . . which may be . . . conveyed to the United States" applies to lands at Castle purchased with the consent granted in Section 111.

In its memorandum filed in this court, the Government sought to distinguish the *Draco* case on the ground that the 1931 West Virginia consent and cession provisions were separate paragraphs in one sec-

tion, while the California consent and cession provisions were in separate sections. Gov't. Br., p. 9. This attempted distinction is footless. The consent provisions in the first paragraph of Sec. 3, Ch. 1, Art. 1, 1931 Code of West Virginia is a codification of the earlier 1881 statute [Sec. 4, Ch. 20, p. 265, 1881 Acts of West Virginia], while the subsequent and controlling cession paragraph, added in 1931, was an amended version of 1909 Acts of West Virginia, Ch. 61, p. 494. The legislative history of the California enactments is similar. Government Code, Section 111, is a codification of the consent provisions of 1872 Political Code Section 34 (Stats. 1939, Ch. 749, p. 2234, as amended, Stats. 1943, Ch. 134, pp. 898, 1009), and as in *Draco*, is qualified by the later cession provisions of Statutes of 1897, Chapter 56, p. 51, as codified into Government Code, Section 114 (Stats. 1943, Ch. 134, pp. 898, 1009).

Such construction of the California statutes accords with the federal administrative interpretation adopted for other California installations. For example, the Office of Chief of Engineers, Army Corps of Engineers, Washington, D.C., stated in its Jurisdiction Summary of Camp Cooke, California, dated November 4, 1957:

> "An attempt was made by the Department of the Army to accept jurisdiction over the fee area by issuance of letter of acceptance by the Secretary of War on 6 January 1943 and acknowledged by the Governor as of 23 January 1943, designed to cover portions of various installations listed on Exhibit "A" attached thereto. This acceptance was

to be effective at 12:00 noon on 15 January 1943 and would have covered the entire fee area of this installation. This letter was intended to constitute formal notice of acceptance of jurisdiction by the Secretary of War for the United States as required pursuant to Act of Congress approved 1 February 1940 (54 Stat. 19, U.S. Code Title 40, Section 255). However, a description by metes and bounds and a map or plat were not filed in the office of record in the County in which the lands are situated (Santa Barbara) as required by the cession Statute of California.

"The Judge Advocate General expressed the opinion in 1st indorsement dated 23 October 1945 (SPJGR 1945 9595), that letters of acceptance unaccompanied by the filing of maps and metes and bounds descriptions should not be relied upon as sufficient authority to vest jurisdiction in the United States over the lands intended to be covered thereby. This opinion was reaffirmed by 2nd indorsement dated 9 April 1954; file JAGR 1954 2153. The reaffirmation arose in connection with a consideration of Opinion No. 53-20[41] dated 8 January 1954 of the Attorney General of the State of California."

Similarly, the Office of Chief of Engineers, Army Corps of Engineers, Washington, D.C., stated in its Jurisdiction Summary of Sharpe General Depot, San Joaquin County, California, dated October 15, 1952:

"Although letters were addressed to the Governor of California accepting exclusive jurisdiction

[41] Opinion 53-20 January 8, 1954 was published as 33 Cal. Ops. Atty. Gen. 14 discussed *supra* at pp. 28-29.

over all lands acquired for military purposes within the state and over which jurisdiction had not previously been obtained, the office of the Judge Advocate General is of the opinion that these acceptances of jurisdiction should not be relied upon as vesting exclusive jurisdiction in the United States over such lands (SPJGR, 1945/9595, 23 October 1945). This opinion is based on the fact that a metes and bounds description and map were not filed as provided in the Act of 2 March 1897 (Calif. Stat. 1897, Ch. 56, which Act appeared as Section 114 of the California Government Code.)

"Accordingly, it must be concluded that Federal jurisdiction has not been acquired over any of the lands used in connection with this installation."

The trial court found that exclusive jurisdiction over Parcel A at Castle had been accepted by the United States by virtue of the letter dated January 3, 1944, sent by the Secretary of War to the Governor of California. 190 F. Supp. 645, 654. This letter stated in part:

". . . that the United States accepts exclusive jurisdiction over all lands acquired by it for military purposes within the State of California, title to which has heretofore vested in the United States and over which exclusive jurisdiction has not heretofore been obtained." R. 320.

Since this notice to the Governor was not accompanied by the filing of plats and land descriptions in the appropriate local offices of record, there is no way for California officials to determine just which particular

parcels of land were intended to be covered.[42] In particular, it gave the State no notice that the United States intended thereby to accept exclusive jurisdiction over Parcel A at Castle. And, in fact, the government's intention to accept such jurisdiction first became known to California upon the filing of its motion for summary judgment April 18, 1960. The conflicting claims of jurisdiction by California and the United States, which have arisen because of the failure of the government to accurately describe the land involved are avoided where the United States files land descriptions and plats as required by the California 1897 statute (Government Code, Section 114). Compare *State* v. *Tully*, 31 Mont. 365, 78 Pac. 760 (1904) with *United States* v. *Tully* (C.C.D. Mont.), 140 Fed. 899 (1905) where the accused escaped conviction because the state and federal courts could not agree on the jurisdictional status of the Fort Missoula Military Reservation.

For the reasons stated, it is submitted that the subsequent California cession statute [Gov. Code, Sec. 114; Stats. 1897, Ch. 56, p. 51] qualified the terms of the earlier consent statute (Gov. Code, Sec. 111, Political Code, Sec. 34), and that the United States by not filing land descriptions and plats at the time it gave notices of acceptance of jurisdiction, thereby

[42] There are 242 military installations in California occupying over 3,850,000 acres of land. R. 458-461. Travis Air Force Base alone is made up of 124 separately acquired parcels of land. R. 979-990. The aggregate number of parcels comprising these 242 installations must, therefore, run into the thousands.

failed to obtain cession of exclusive jurisdiction over Parcel A at Castle.

6. PARCEL A AT CASTLE WAS ACQUIRED PURSUANT TO SECTION 10 OF THE LANHAM ACT, 54 STAT. 1125, WHICH EXPRESSLY RECOGNIZED THAT STATE SOVEREIGNTY SHOULD CONTINUE OVER THE LAND SO PURCHASED.

The only parcel of land at Castle claimed by the government to be within exclusive federal jurisdiction, is Tract A, the 18.36 acre civilian housing unit, located just outside the main gates to the installation. R. 349, 381, 385; Gov't. Br., p. 12. Possession of parcel A was taken by the government on June 26, 1942, pursuant to a "right-of-entry" granted by the person in possession. R. 604, 640. On June 26, 1942, title to parcel A was vested in the Federal Farm Mortgage Corporation. R. 349, 493. By deed dated July 17, 1943, the Federal Farm Mortgage Corporation conveyed title to one Sheldon Phillips. R. 349, 556. Title to parcel A on the same day, July 17, 1943, passed to the United States under the previously executed deed dated April 6, 1943. R. 490; Calif. Civil Code, Sec. 1106; 190 F. Supp. 645, 654. The consideration for conveyance of title to parcel A was $2,500.00 (R. 554), which was paid out of funds appropriated under the Lanham Act, 54 Stat. 1125. R. 233, 381. See Opinion of the Corps of Engineers, U.S. Army, dated March 19, 1959, expressing the view that California exercises jurisdiction over parcel A by virtue of the restrictions in the Lanham Act. R. 380-381.

While originally under the control of the National Housing Agency (R. 229), administrative control of

this defense housing unit was passed to the Secretary of War effective September 1, 1942. R. 235. It provided that the status of the unit could be changed from temporary housing to permanent housing. Sec. 1, Lanham Act, as amended by the Act of January 21, 1942, 56 Stat. 11, 12. R. 235.

Section 10 of the Lanham Act provided:

> "Sec. 10. Notwithstanding any other provision of law, the acquisition by the Administrator of any real property pursuant to this Act shall not deprive any State or political subdivision thereof of its civil and criminal jurisdiction in and over such property, or impair the civil rights under the State or local law of the inhabitants on such property."

This statute unequivocally states that the purchase of land with funds appropriated under the Lanham Act shall not deprive a state of either civil or criminal jurisdiction over such land. Section 10 of the Lanham Act in this respect is similar to Section 12 of the Act of March 1, 1911, 36 Stat. 961, which provided with respect to forest lands purchased by the United States:

> "That the jurisdiction, both civil and criminal, over persons upon the lands acquired under this Act shall not be affected or changed by their permanent reservation . . . as national forest lands, . . . the intent and meaning of this section being that the State wherein such lands are situated shall

Similar provisions in other Congressional statutes authorizing the acquisition of federal reservations are found in Section 1 of the Act of June 25, 1910, 36 Stat. 847, 848 (Government property); and in Section 355 of the Act of June 25, 1936, 49 Stat. 1925, 1926 (Indian lands); and other similar statutes.

not, by reason of such reservation or administration, lose its jurisdiction nor the inhabitants thereof their rights and privileges as citizens or be absolved from their duties as citizens of the State."

In *Wilson* v. *Cook*, 327 U.S. 474, 486 (1946), this Court held that "by this enactment Congress in effect has declined to accept exclusive legislative jurisdiction over forest reserve lands. . . ." The similar language in section 10 of the Lanham Act plainly was intended to preserve state jurisdiction over land purchased by the United States for housing projects under the Lanham Act. *Johnson* v. *Morrell*, 20 C. 2d 446, 452, 126 P. 2d 873 (1942).

The trial court, however, held that the transfer of administrative control of the housing project to the Department of War on September 1, 1942, under section 4 of the Lanham Act, removed from the project the restrictions prohibiting acceptance of jurisdiction in section 10. 190 F. Supp. 645, 654. Section 4 of the original 1940 act (54 Stat. 1127) provided:

> "When the President shall have declared that the emergency declared by him on September 8, 1939, to exist, has ceased to exist . . . (b) property acquired or constructed under this Act shall be disposed of as promptly as may be advantageous under the circumstances and in the public interest."

The original section 4 was repealed and a new section 4 enacted by Congress in 1942: Act of January 21,

1942, 56 Stat. 12. The new Section 4 read in relevant part:

> "It is hereby declared to be the policy of this title to further the national defense by providing housing in those areas where it cannot otherwise be provided by private enterprise when needed, and that such housing may be sold and disposed of as expeditiously as possible . . . Provided further, that the [Federal Works] Administrator may, in his discretion, upon the request of the Secretaries of War or Navy transfer to the jurisdiction of the War or Navy Departments such housing constructed under the provisions of this Act as may be considered to be permanently useful to the Army or Navy . . ."

The purpose of Congress in amending Section 4 was to insure that ". . . housing built under this legislation should be sold and disposed of by the Government as expeditiously as the public interest may permit. It was never considered by the committee that this housing should be designed for use as slum clearance projects or to provide subsidized housing for persons of low income." House Report No. 1457, 77th Cong., 1st Sess., p. 3. The exception to this requirement of prompt sale was the proviso authorizing transfer of administrative control of these housing projects to the Navy and War Departments for their *permanent* use. See statement of Senator Ellender, 87 Cong. Rec. 10028-10029. This legislative history shows that Congress, in amending *Section 4* of the Lanham Act, was concerned with the permanency of

these housing projects and their cost to the federal fiscal. In sharp contrast, *Section 10* had as its objective the preserving of local [illegible] police, health and education services for the [illegible]idents of these housing tracts. The 1942 amendments to Section 4 were therefore directed to the administrators of the housing project, while the provisions of Section 10 were intended to benefit the residents in the tract. Parcel A is now, as it has been since 1942, utilized as a civilian defense housing project. R. 349, 351. The sheriff of Merced County exercises criminal jurisdiction over offenses committed on the project. R. 351. The children of its residents attend the public schools operated by the Atwater Elementary School District. R. 351. Its residents now, as in 1942, are entitled to the state and local services which are available under local law. To be sure, a more serious question would be posed had the use of Parcel A been changed from civilian housing to, say, that of a runway at the airbase. This change in use has not occurred. It follows that the trial court erred in finding that the provisions of Section 10 of the Lanham Act were inapplicable to Parcel A at Castle.

7. CONTRACTORS DELIVERING MILK TO PARCEL A AT CASTLE ARE SUBJECT TO THE CALIFORNIA MILK STABILIZATION ACT SINCE THE STATE ACT WAS ASSIMILATED AS FEDERAL LAW. IF ARGUENDO, EXCLUSIVE JURISDICTION OVER PARCEL A PASSED TO THE UNITED STATES.

When the United States takes exclusive jurisdiction over land from a state, the laws of the original sovereign in effect at the time of the taking which are

not inconsistent with the laws of the United States, continue in effect as the laws of the succeeding sovereign until changed by the federal government. *Chicago, Rock Island and Pacific Railway* v. *McGlinn*, 114 U.S. 542, 546 (1885); *Ufuk* v. *Mojalia*, 220 U.S. 345, 357 (1911). This assimilation of the laws governing the rights of the occupants of the territory transferred insures that such an area will not be left without a developed legal system for private and public rights. *Stewart & Co.* v. *Sadrakula*, 309 U.S. 94, 99 (1940).

In *Pacific Coast Dairy* v. *Dept.*, 318 U.S. 285, 293 (1943), the court noted that regulatory laws such as the California milk stabilization act were assimilated as federal law upon a transfer of sovereignty, but that assimilation did not occur at the installation there involved (Moffett Field) because the state statute (Stats. 1935, Ch. 241, p. 922, as amended Stats. 1937, Ch. 3, p. 42; Stats. 1937, Ch. 413, p. 1342; and Stats. 1937, Ch. 716, p. 1988) was enacted subsequent to the date that the government had secured exclusive jurisdiction.[*] The clear inference is left that the California

[*] In *Pacific Coast Dairy* v. *Dept.*, 318 U.S. 285, 293, the court relied on *Standard Oil Co.* v. *California*, 291 U.S. 242 (1934), and on *Constitutional Milk Producers* v. *Parker*, 104 Cal. App. 815, 827, 287 Pac. 140, 142, and on the expressed view of counsel in assuming that California had made a cession of exclusive jurisdiction over Moffett Field. Both the *Standard Oil* and *Constitutional* cases involved the Presidio of San Francisco, where land descriptions and a plat had been filed with the county recorder's office under the California cession statute, Stats. 1897, Ch. 56, p. 51, and the Court apparently assumed that such filings had been made at Moffett. The facts at Castle are opposite since the government concedes that it has never filed land descriptions and a plat thereof as the under either the 1897

milk stabilization act would have remained in force at Moffett Field had the transfer of jurisdiction occurred after the enactment of the state statute in 1935.

Castle was acquired *subsequent* to the 1937 enactment of the milk statute (i.e., between July 17, 1943, to June 11, 1956; R. 352, 383-387) and the previously enacted milk stabilization act remained in force under the *Pacific Coast Dairy* case, assuming arguendo that a cession of jurisdiction was made over Castle. Since the stabilization act remained in force at Castle, California should have power to enforce the law against contractors making delivery to Castle. *Penn Dairies, Inc. v. Milk Control Comm'n.*, 318 U.S. 261 (1943).

The court below avoided reaching this conclusion by holding (1) that the California milk stabilization act conflicts with federal procurement policy, and (2) because, even if the state statute remained in effect at Castle, it could not be enforced by California officials against contractors delivering milk to Castle, but only by federal officials. 190 F. Supp. 645, 658-659.

In answer to the first ground, state officers point out as they have previously in this brief (*supra*, pp. 63-81) that the state milk stabilization acts do not conflict with federal procurement policy (*Penn Dairies, Inc. v. Milk Control Comm'n.*, 318 U.S. 261) and that the California statute, as construed by the highest

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statute or its successor, Gov. C., sec. 114. R. 695, 700, 814. Further, state officers in this proceeding, unlike the *Pacific Coast Dairy* litigation involving Moffett Field, California, 318 U.S. 285, do not concede that the United States has exclusive jurisdiction over any portion of Castle.

state court, does not impose a prohibition on either the United States or its officers. *Pacific Coast Dairy v. Dept.*, 19 C. 2d 818, 830, rev'd. on another ground 318 U.S. 285 (1943).

The second ground given by the trial court is equally footless. Contractors with the United States do not enjoy immunity from state regulation either where the activity sought to be regulated occurs on land within state jurisdiction (*Penn Dairies, Inc. v. Milk Control Comm'n.*, 318 U.S. 261) or on land where state law remains in force by assimilation. *Stewart & Co. v. Sadrakula*, 309 U.S. 94, 99. And if such contractors cannot claim implied federal immunity, then such persons are subject to enforcement of the transitory cause of action in the state courts where substantial violations of law occur on land within state jurisdiction. *Stewart & Co. v. Sadrakula*, 309 U.S. 94; *Commonwealth v. Rohrer*, 37 Pa. D. and C. 410 (1937). *Johnson v. Yellow Cab Co.*, 321 U.S. 383 (1944), relied upon by the district court is inapposite. In this case, there was involved a state seizure of liquor in transit by a common carrier through the state to an officers' club located within an installation under exclusive federal jurisdiction. The court's decision invalidating the seizure was grounded on the fact that no state law purported to prohibit shipments through the state to an area under federal jurisdiction. In connection with the collateral question of the clean hands of the plaintiffs, who wanted the return of the seized liquor, the court refused to decide whether the

Oklahoma laws were assimilated so as to make illegal under federal law the receipt of the liquor on the installation. This refusal was based on the circumstance that the record consisted of stipulations between the common carrier and state officials to the effect that the seizure under state law was illegal and that the interests of the United States were not represented in the suit. 321 U.S. 394-392. The *Johnson* case is, therefore, no authority for the proposition that California cannot try its transitory cause of action in the state courts for violations of state law occurring in substantial part on areas within state jurisdiction. See *Osborn* v. *Ozlin*, 310 U.S. 53, 62-63 (1940); *Alaska Packers Assn.* v. *Comm.*, 294 U.S. 532, 541 (1935); *Skiriotes* v. *Florida*, 313 U.S. 69, 76-79 (1941).

8. THE DISTRICT COURT ERRED IN RELYING ON PACIFIC COAST DAIRY AS AN APPLICABLE AUTHORITY.

The district court erred in relying on the decision in *Pacific Coast Dairy* v. *Dept.*, 318 U.S. 285 (1943) as authority for holding the state milk stabilization act unconstitutional as applied to the Castle, Travis and Oakland installations. In *Pacific Coast Dairy* counsel for the State conceded arguendo, for the purpose of testing the point of law involved, that Moffett Field was a federal enclave subject to the "exclusive jurisdiction of the Federal Government" and that the State had no power to apply its wholesale milk price regulations to milk sold within the Moffett installation, citing *Standard Oil Co.* v. *California*, 291 U.S. 242 (1934) and *Consolidated Milk Producers* v.

Parker, 19 C. 2d 815, 123 P. 2d 440 (1942). Brief for Appellees, *Pacific Coast Dairy* v. *Dep't.*, Supreme Court of the United States, Oct. Term 1942, No. 275, pp. 8, 22. But both the *Standard Oil* and *Consolidated Mill Producer* cases involved transactions occurring on the Presidio of San Francisco, where the government in 1913 had filed land descriptions under the 1897 statute. *United States* v. *Watkins*, (D.C.N.D. Calif. 1927), 22 F. 2d 437, 439. In contrast, the government concedes that land descriptions and plats were not filed under this 1897 statute for Parcel A at Castle. R. 349-350, 643. Therefore, the *Pacific Coast Dairy* case is no authority for the proposition that the United States exercises exclusive jurisdiction over Parcel A at Castle. Instead, the preceding sections of this brief show that California exercises jurisdiction over Parcel A and that *Penn Dairies, Inc.* v. *Milk Control Comm'n.*, 318 U.S. 261 (1943) is the controlling precedent.

C. California Exercises Jurisdiction Over the Travis Installation.

1. ACQUISITION AND PROCUREMENT HISTORY AT TRAVIS.

Travis Air Force Base, totaling 4131 acres, is located in Solano County, California. R. 806-817. While the court below held that the record "shows without contradiction" that the lands comprising Travis were acquired between December 1942 and March 1943 (190 F. Supp. 645, 652), the record plainly shows that these parcels were acquired by successive conveyance and

condemnation action from September 4, 1942, to June 17, 1958.[45] R. 806-817. No claim of jurisdiction over Travis is made by the government under Statutes of 1897, Chapter 56, page 54 (Government Code, Section 114), since no effort was made to file the land descriptions and plats of the land with the Solano County recorder as required by these statutes. R. 352, 644 Govt, Br. 9.

The district court found that jurisdiction over Travis passed to the United States on April 16, 1943, the date of a blanket notice accepting jurisdiction. 190 F. Supp. 645, 652; R. 374. The lower court's error in the dates of acquisition at Travis is material since over 95 parcels of land at Travis were acquired subsequent to April 16, 1943. R. 808-817. Contrary to the finding of the district court, state jurisdiction over these parcels is conclusively presumed under Revised Statutes Section 355, as amended by the Act of October 9, 1940, 54 Stat. 1083, assuming arguendo that jurisdiction could have been transferred to the United States in the first place under Political Code Section 34, as found by the district court.[46] *Adams* v. *United States*, 319 U.S. 312 (1943).

[45] The underlying facts in the affidavits and exhibits attached to the government's motion for summary judgment must be viewed in the light most favorable to appellant state officers. *United States* v. *Diebold*, 369 U.S. 654, 655 (1962).

[46] Parcels numbered 15, 25, 29, 37, 46B to 603-E-3, and the unnumbered parcels, R. 808-817. Parcels numbered 15, 25 and 37 were acquired after the blanket letter of April 16, 1943 (R. 374) and the most recent blanket letter of January 3, 1944 (R. 339). R. 979. Thus, no notice of acceptance of jurisdiction has been given at all at Travis over more than 93 of the parcels at Travis.

Milk is received for resale at the Travis Officers' Club located on parcel 47 (R. 644-645, 819-821) and is received for troop ration at Dining Halls numbers 6 and 7, and building 381 on parcel 49. (R. 819-821). Parcel 47 was acquired May 11, 1946 (R. 806), and parcel 49 was acquired May 26, 1946 (R. 806). Since these parcels were acquired subsequent to the notices of acceptance of jurisdiction dated April 16, 1943 (R. 374), and January 3, 1944, the date of the latest government acceptance of jurisdiction letter (R. 339), they a fortiori lie within the conclusive presumption of state jurisdiction even if the latter, rather than the earlier notice of April 16, 1943 (R. 374), is deemed controlling. *Adams* v. *United States*, 319 U.S. 312.

Milk is delivered to the Travis Post Exchange and to the Travis Commissary Store located on parcel 18-A (R. 644-645, 819-821), to the Noncommissioned Officers' Open Mess located on parcel 16 (R. 644-645, 819-821), to Dining Hall No. 1 located on parcel 17-A (R. 819-821), the No. 3083 Mess Hall located on parcel 13 (R. 819-821) and to the Cold Storage Building located on parcel No. 7. (R. 819-821). Parcels 7; 13, 16, 17-A and 18-A were acquired prior to the blanket notice accepting jurisdiction dated April 16, 1943 (R. 374) and are therefore within the disputed questions of jurisdiction discussed in connection with the status of parcel A at Castle. R. 806-807.

The contracts for the purchase of milk from appropriated funds were not executed by the contracting

officer at Castle but by higher military authority at another installation. R., 248, 272. Thus, only the delivery of milk to the commissary store and to the mess halls occurred on the installation, the sale of the milk occurring off the base, *United States* v. *Parcell Envelope Co.*, 249 U.S. 313, 319-320 (1919); *Garfield* v. *United States*, 3 Otto 242, 243 (1876).

2. AS AT CASTLE, THE LEGAL AND FACTUAL PATTERN FOR TRAVIS SHOWS THAT CALIFORNIA EXERCISES JURISDICTION OVER THE TRAVIS AIR FORCE BASE.

The district court found that exclusive jurisdiction over all of the parcels at Travis was transferred to the United States under Political Code, Section 34, as amended in 1939 (Stats. 1939, Ch. 710, p. 2231) as of April 16, 1943, by virtue of the blanket notice of acceptance of jurisdiction given on that date.[17] R. 374; 190 F. Supp. 645, 652.

The statutes, federal and state, applicable to Travis are the same as for Castle, with the exception that the record does not show if the housing tracts at Travis were acquired under the Lanham Act, 54 Stat. 1125. R. 821. The blanket letter accepting jurisdiction dated April 16, 1943 (R. 374), which the trial court mentioned in connection with Travis is similar to the later blanket letter dated January 3, 1944 (R. 339), which is related to Parcel A at Castle. Therefore, the statutory and factual analysis which establishes that Cali

[17] The text of this letter, dated April 16, 1943, is set forth in the appendix at p. 224

fornia exercises jurisdiction over Parcel A at Castle impels the finding that California exercises like jurisdiction over those few parcels (Nos. 1 to 14, 16 to 19, and 29) acquired at Travis prior to April 16, 1943, the date of the blanket letter of acceptance." R. 374. Of course, the many parcels acquired subsequent to the letter of April 16, 1943 (or the letter of January 3, 1944, if applicable) are conclusively presumed to be within state jurisdiction, there having been not even a notice given accepting jurisdiction over these parcels, quite apart from the failure of the government to observe the filing and recording requirements of the 1897 statute as codified in 1943 into Government Code, Section 114, or the later requirements, first enacted in 1946, of Government Code, Section 126, Revised Statutes, Section 355, as amended: *Adams* v. *United States*, 319 U.S. 312 (1943). Since all the parcels at Travis are subject to state jurisdiction, California may, therefore, constitutionally enforce its milk stabilization act against contractors delivering to such installation. *Penn Dairies, Inc.* v. *Milk Control Comm'n.*, 318 U.S. 261 (1943).

[1] Parcels 15, 25 and 37 at Travis were acquired between April 16, 1943 and January 3, 1944, the date of the latest blanket notice accepting jurisdiction (R. 339) and would fall in the class of disputed parcels of land at this latter notice were deemed controlling. R. 806.

D. California Exercises Jurisdiction Over the Oakland Army Terminal.

1. ACQUISITION AND PROCUREMENT HISTORY AT OAKLAND.

The district court found that "the record shows without contradiction" that the owned lands comprising the Oakland Army Terminal were acquired by the United States by condemnation proceedings in 1950, and that the United States exercises exclusive jurisdiction over the installation. 190 F. Supp. 645, 649. To the contrary, the record shows that a portion of the installation is leased (122.4 acres) and a portion owned in fee (478.6 acres).[49] R. 149, 639. The portion owned in fee, consisting of parcels A-114, B-206, B-209, B-210, B-211, B-220, B-222, C-300, C-302, C-305 and C-306 was not acquired solely in 1950 but was acquired by successive purchase and condemnation between January 15, 1941 to September 11, 1953. R. 368, 639; see parcel history set out in the appendix at pp. 231-232. Parcels A-115, A-116, A-117, A-118, A-119, A-120, A-122, A-123, A-124, A-126, A-127, A-131, A-115-2 and A-119-2 are leased. R. 149, 639.

The Secretary of the Army apparently had come to the conclusion in 1945 that the government's previous blanket notices of April 16, 1943 (R. 374) and of January 3, 1944 (R. 339) accepting "exclusive jurisdiction over all lands acquired by it for military purposes within the State of California, title to which

[49] As at Travis, since there was no trial on the facts, the rule that trial court findings of fact shall not be set aside on appeal unless clearly erroneous has no application. Rule 52(a), Federal Rules of Civil Procedure.

has heretofore vested in the United States'. . . " were invalid because the lands affected had not been identified by the filing of land descriptions and plats as required by the State 1897 cession statute (Government Code Section 114). Judge Advocate General opinion SPJGR 1945 9595, dated October 23, 1945. See JACK 1954 2153, dated April 9, 1954. Thereafter, the Secretary of the Army on April 21, 1949, again gave notice to the Governor of California that jurisdiction over 478.75 acres of land at Oakland was accepted by the United States "subject to each and all of the conditions and reservations prescribed in Chapter 1532, Statutes of California, 1947 (Section 126, Government Code)." R. 372. Upon discovery that this notice did not comply with California law, the Secretary of War on July 5, 1950, filed an application with the California State Lands Commission requesting "a public hearing by the Commission to determine whether the conditions and reservations respecting consent to the acquisition by the United States of the following described land in the State of California have been met: [metes and bounds description omitted]." R. 368. The application further stated: "The Department of the Army, in behalf of the United States of America, hereby assents to acceptance of federal jurisdiction over the subject land . . . upon and subject to each and all of the conditions and reservations prescribed in said California Government Code Section 126 . . ." R. 368. After a public hearing, the California State Lands Commission on October 5, 1950, adopted a reso-

lution finding that the conditions precedent to the granting of state consent to acquire these lands in Section 126 had been met and that "such acquisition is in the interest of the State." R. 140, 138.

The property description in the notice of July 5, 1950, included a portion of parcel A-114 (excluding an area of 123.33 acres acquired September 11, 1953; R. 93-94; see appendix, p. 281). Also included were the federally owned tracts B-206, B-209, B-210, B-211, B-220, B-222, C-300, C-302, C-305 and C-306. R. 368. The United States, therefore, could not have obtained exclusive jurisdiction over the said 123.33 acre portion of parcel A-114, nor over parcels A-115, A-116, A-117, A-118, A-119, A-120, A-122, A-123, A-124, A-126, A-127, and A-131, A-115-2 and A-119-2 which are leased. This is so because the government has never given notice of acceptance of jurisdiction over these parcels. It is noted that the notices of April 16, 1943, and January 3, 1944, accepted jurisdiction only over parcels owned in fee by the United States and that the notice of April 21, 1949, accepted jurisdiction only over the 178.6 acres owned in fee on that date at Oakland. R. 330, 372, 374. State jurisdiction is therefore effectively presumed over these leased parcels under Revised Statutes, Section 355, as amended. *Adams v. United States*, 319 U.S. 312 (1943).

The offers of contractors to furnish milk to be Oakland commissary store and troop messes were accepted in writing at Fort Mason located in San Francisco. R. 39. The sale of the milk, in the scope that

the property interest in the milk was to be subsequently transferred to the government by virtue of the written contract, therefore occurred in San Francisco and not within the Oakland Army Terminal. *United States v. Parcell Envelope Co.*, 249 U.S. 313, 319-320 (1919); *Fairfield v. United States*, 3 Otto 242, 243 (1876).

Milk is delivered for resale at the Oakland Officers' Club located on leased parcel A-119, R. 647. As noted, since no notice accepting jurisdiction over parcel A-119 has been given by the government, state jurisdiction as to the parcel is conclusively established, and in any event the parcel is leased, not owned, by the United States. Milk is also delivered for resale at the Oakland Post Exchange, the restaurant, the commissary and for home ration on parcel B-210, R. 545-549, 647. Title to parcel B-210 was acquired by conveyance March 2, 1942 and was included in the lands described in the government's application to the California State Lands Commission dated July 6, 1950, R. 569, 939.

THE CALIFORNIA LEGISLATURE IN ENACTING GOVERNMENT CODE, SECTION 96, DID NOT THEREBY EFFECT A TRANSFER OF EXCLUSIVE JURISDICTION OVER OAKLAND TO THE UNITED STATES

The district court held that California could not enforce its milk stabilization act against contractors delivering milk to the Oakland Army Terminal because the State had given its consent to Government

Code Section 126[39] to the acquisition of certain of the parcels at Oakland. 190 F. Supp. 645, 652. The trial court noted that Government Code, Section 126, makes express reference to Constitution Article I, Section 8, clause 17, which it characterized as dealing "specifically with the acquisition by the United States of 'exclusive legislative jurisdiction,' over lands purchased by the United States . . . with the consent of the legislature of the State." 190 F. Supp. 645, 650.

The court below thereby misquoted clause 17 which does not contain the phrase "exclusive legislative jurisdiction." Instead, clause 17 gives Congress power to exercise "exclusive legislation" over lands purchased by the United States for military purposes. This power in Congress to legislate over such lands was thereby confused in the lower court's mind with a cession by a state of exclusive jurisdiction.

The language of Section 126, as amended by Statutes of 1947, Chapter 1532, page 3163, read:

> "126. Notwithstanding any other provision of law, general or special, the Legislature of California consents to the acquisition by the United States of land within this State upon and subject to each and all of the following express conditions and reservations, in addition to any other conditions or reservations prescribed by law:
>
> "(a) The acquisition must be for the erection of forts, magazines, arsenals, dockyards, and other needful buildings, or other public purpose within

[39] Gov. Code, Sec. 126, as enacted Stats. 1st Ex. Sess. 1946, ch. 154, p. 199, and as amended Stats. 1947, ch. 1532, p. 3163, are set forth in the appendix at pp. 204 and 216.

> the purview of Clause 17 of Section 8 of Article I of the Constitution of the United States, or for the establishment, consolidation and extension of national forests under the provisions of the act of Congress approved March 1, 1911, (36 Stat. 961) known as the 'Weeks Act'; . . ."

No words of cession of jurisdiction appear in the statute, and, therefore, the Legislature intended to do no more than to give the state consent required in clause 17 before Congress can exercise the powers of "exclusive legislation" over such land.

This power to exercise exclusive legislation is the same power mentioned in Article I, Section 2, clause 1, of the Constitution which grants "all legislative power granted herein" to the Congress. This authority to legislate, like the power to regulate commerce between the states, is not *per se* pre-emptive as applied to local matters and is effective only as Congress chooses to avail of it. See *Parker v. Brown*, 317 U.S. 341, 361-363 (1943), and the discussion of Political Code section 34, supra p. 89. In contrast a cession of jurisdiction has been held to transfer the state authority over the land involved to the United States. Thus, for example, a cession of jurisdiction over the Presidio of San Francisco occurred in 1913 when the government filed land descriptions and a plat of the installation with the San Francisco Recorder's Office pursuant to California Statutes of 1897, Chapter 56, page 51. *United States v. Watkins*, (D.C.N.D. Calif. 1927), 22 F. 2d 437, 439.

The trial court supported its statement that exclusive jurisdiction can be transferred by a state statute, which consents to the federal purchase of land, but which is not in the form of a cession, by asserting (1) that it was originally believed that jurisdiction could only be acquired by a state consent statute, and (2) that "cessions" of jurisdiction were not recognized until the 1885 decision in *Fort Leavenworth R.R. Co. v. Lowe*, 114 U.S. 525, 190 F. Supp. 645, 651. The 1808 decision of Mr. Chief Justice Marshall in *Young v. The Bank of Alexandria*, 4 Cranch, 384 (1808) is inapposite. In 1789 Virginia had ceded "exclusive jurisdiction" over an area of land to the United States for use as the center of government with a reservation of state jurisdiction until Congress ". . . shall by law provide for the government thereof . . . ."

Hening's Va. Stats. 1789, Vol. 13, Ch. 32, p. 33. Congress accepted the cession of jurisdiction but provided that Virginia laws should continue in effect until "Congress shall otherwise by law provide." Act of July 16, 1790, 1 Stat. 130. In the *Young* decision, it was held that "under the terms of the *cession* and acceptance of the district, the power of legislation remained in Virginia until it was exercised by Congress." (Emphasis added.) 4 Cranch 384, 397. Thus, contrary to the view of the trial court, transfers of jurisdiction by cession with reservations of state power were recognized early in United States history. The isolated statement, cited by the court below (190 F.

Supp. 645, 651 ; from *United States v. Railroad Bridge Company* (6 A.N.D. Ill. 1855), 27 Fed. Cas. 686, 690, that a state consent to purchase constitutes a cession of jurisdiction, was *obiter dictum* since the land there involved (Fort Armstrong, Ill.) had not been purchased, but had been set aside from the public domain since 1812, and was so held when Illinois became a state in 1818, Joint Resolution of December 3, 1818, 3 Stat. 536. The decision in the case was that the bridge company, with consent of the State of Illinois, could construct a railroad bridge across the federally-owned land.

There remains the question regarding the effect to be given the provision in Section 12(c) (Stats. 1st Ex. Sess. 1946, Ch. 154, p. 1199) that "The United States must in writing have assented to acceptance of jurisdiction over the land upon and subject to each and all of the conditions and reservations in this section prescribed: . . ." No language of cession appears in this subsection which therefore means only that the United States, or its agencies, must agree that the land involved should become subject to the legislative power in Congress under Article I, Section 8, Clause 17. Appellants have argued that Clause 17 is not pre-emptive of state authority except as this power is exercised by Congress. If this construction is correct, then California exercises jurisdiction over Oakland since Congress has not chosen to exercise its legislative power. It is noted that the construction of this subsection made by the trial court was not

accepted by the California Legislature which changed the wording from "(c) The United States must in writing have assented to acceptance of jurisdiction over the land . . ." to "(c) The United States must in writing have requested state consent to acquire such land. . . ." Stats. 1961, Ch. 966, p. 2607.

The provisions in former 126(c) that the United States must have given assent to the acceptance of jurisdiction must be read with the provision in subsection 126(a) that the acquisition must be for military purposes "or for the establishment, consolidation and extension of national forests under the provisions of the act of Congress approved March 1, 1911 (36 Stat. 961), known as the 'Weeks Act.'" Stats. 1947, Ch. 1532, p. 3163. Section 12 of the federal act expressly provides:

> "That the jurisdiction, both civil and criminal, over persons upon the lands acquired under this Act shall not be affected or changed by the permanent reservation and administration as national forest lands, . . . the intent and meaning of this section being that the State wherein the land is situated shall not, by reason of such reservation and administration, lose its jurisdiction. . . ." 36 Stat. 963.

Statutes should not be construed so as to be meaningless. Yet, this is the very result if the Legislature is found to have required federal acceptance of jurisdiction over forest lands purchased with state consent, with knowledge of the judicial interpretation that federal acceptance of jurisdiction is prohibited.

Wilson v. *Cook*, 327 U.S. 474, 486 (1946). A reconciling construction is that Section 126 was not intended by the California Legislature to transfer exclusive jurisdiction to the United States, but instead was intended only to place the land involved under the legislative control of Congress under clause 17.

3. CALIFORNIA RESERVED ITS CRIMINAL AND CIVIL JURISDICTION OVER OAKLAND, BECAUSE OF THE RESERVATIONS IN GOVERNMENT CODE, SECTIONS 113 AND 126.

The Court may not agree with state officers' construction of clause 17 and may find that a state's *unqualified* consent to purchase land for military purposes results in a transfer of state jurisdiction when the land is actually conveyed to the United States by reason of the pre-emptive effect of Constitution Article I, Section 8, clause 17. Notwithstanding, California retains criminal and civil jurisdiction over Oakland because of express qualifications to the state's consent made in Government Code, Sections 113 and 126.

The California Legislature in enacting Government Code Section 126 granted consent to the acquisition of land by the United States "upon and subject to each and all of the following express conditions and reservations, *in addition to any other conditions or reservations prescribed by law*. . . ." (Emphasis added.) Stats. 1947, Ch. 1532, p. 3163. This reference to "any other conditions or reservations" in Section 126 clearly has reference to the reservation of "the administration of the criminal law of the State with respect to any land over which *any jurisdiction* has

been or may be ceded or conveyed to the United States . . ." set forth in Government Code Section 113 (emphasis added). Stats. 1947, Ch. 1532, p. 3163. The interrelation of Sections 113 and 126 is made clear by the fact that both sections were amended by Chapter 1532 of the 1947 California Statutes. Senate Bill 656, which later became Chapter 1532, as originally introduced in the California Senate on January 29, 1947, amended Section 126 to provide that the public hearing and findings required by the statute should be made by the State Lands Commission rather than by the State Board of Equalization. The bill was amended in the State Senate on May 16, 1947, in two respects: Section 126 was amended to give state consent to the federal acquisition of forest lands under the Act of March 1, 1911, 36 Stat. 961, and Section 113 was amended to strike language of cession of jurisdiction, and to add language reserving the administration of the criminal laws of the state "with respect to any land over which any jurisdiction has been or may be ceded or conveyed to the United States." California Senate Journal, 1947, Vol. 2, pp. 2166-2167.[21]

The district court correctly held that the phrase "other conditions or reservations prescribed by law" in Section 126 incorporated the reservation of state criminal jurisdiction made in Section 113, but fell

[21] Senate Bill 656, as introduced into the Legislature January 29, 1947, and as amended in the State Senate May 16, 1947, is set forth in the appendix at pp. 213-218. 1947 California Senate Bills Nos. 576-675, California State Library. Section 113 as enacted by Stats. 1943, Ch. 134, p. 898, and as amended, Stats. 1947, Ch. 1532, p. 3164, is set forth in the appendix at p. 211.

into error in limiting the application of Section 113 "to lands 'ceded' to the United States, as distinguished from lands acquired through purchase or condemnation by the United States with the State's consent—as in the case of these Oakland Army Terminal Lands." 190 F. Supp. 645, 651.

Section 113, as amended by Statutes of 1947, Chapter 1532, page 3164, reserved state criminal jurisdiction "with respect to any land over which any jurisdiction has been or may be ceded or conveyed to the United States. . . ." It follows, that if, as found by the district court, jurisdiction was ceded to the United States over federally-owned parcels at Oakland under Section 126, there was reserved from that grant the state's criminal jurisdiction over such parcels.

On the other hand, Statutes of 1891, Chapter 181, page 262, and its successor Section 113, as enacted by Statutes of 1943, Chapter 134, page 898, and as amended Statutes of 1947, Chapter 1532, page 3164, also reserved state criminal jurisdiction over lands "conveyed" to the United States. The term "conveyed" when used in referring to real property imports a purchase of legal title. *Seal of Gold Mining Co. v. Slater*, 161 Cal. 621, 630, 120 Pac. 45 (1911). And a "purchase" of land by the government includes acquisitions by both deed of conveyance and by judgment in condemnation. *Kohl v. United States*, 1 Otto 363, 374 (1876). Therefore, when the United States obtained title by conveyance and by condemnation over certain of the parcels at Oakland, it took these

parcels subject to the statutory reservation of the state's criminal jurisdiction. Thus there was reserved from the consent that Congress have the power to exercise exclusive legislation over such parcels under clause 17, the state's power to exercise jurisdiction over crimes committed on such parcels.

It is noted that the State Legislature in amending Section 113 in 1947 (Stats. 1947, Ch. 1532, p. 3164), dropped from the section all language of cession of jurisdiction, and rearranged the 1943 language so that instead of reserving criminal jurisdiction "over such land as has been or may be ceded or conveyed to the United States . . ." (Stats. 1943, Ch. 134, p. 898), Section 113 now reserved criminal jurisdiction over "any land over which any jurisdiction has been or may be ceded or conveyed to the United States. . . ." But in the context that land, instead of jurisdiction, is ceded by one sovereign to another, and that the same California Senate Bill (No. 656, 1947 legislative session) amended both Sections 113 and 126, it is plain that the Legislature intended to reserve the State's criminal jurisdiction over "any land" passing by virtue of Section 126 within the congressional power to exercise exclusive legislation.

Contrary to the trial court's opinion that the 1891 reservation of jurisdiction (Section 113) did not qualify the terms of the 1872 consent to purchase statute (Section 126), this Court in an analagous case held that the reservation of concurrent jurisdiction

in a state cession statute qualified the language in an earlier consent to purchase statute, thereby also qualifying the power in Congress to exercise exclusive legislation over such purchased lands under Constitution, Article I, Section 8, clause 17. In *James v. Dravo Contracting Co.*, 302 U.S. 134, 143 (1937), the court held that the provision in a 1931 West Virginia statute reserving "concurrent jurisdiction" (added in 1931) qualified an 1881 provision in the same statute granting state consent to the government to purchase land for government purposes. Sec. 3, Ch. 1, Art. 1, 1931 Code of West Virginia; Sec. 4, Ch. 20, p. 265, 1881 Acts of West Virginia.[32] Similarly, the 1947 amendment to Section 113 reserving the administration of the criminal law of the state (Stats. 1947, Ch. 1532, p. 3164) qualified the earlier 1946 consent language in Section 126, Stats. 1st Ex. Sess., 1946, Ch. 154, p. 199.

The government suggests, though, that the reservation in Section 113 reserving "the administration of the criminal laws of the State" did not effect a reservation of state criminal jurisdiction but reserved only the right to serve criminal process. Gov't Br. 11. This contention is footless since the history of the provision clearly shows that both the Congress and the California Legislature intended the phrase to reserve state criminal jurisdiction over crimes committed on such federally owned property.

[32] Sec. 3, Ch. 1, Art. 1, 1931 Code of West Virginia and Sec. 4, Ch. 20, p. 265, 1881 Acts of West Virginia are set forth in the appendix at pp. 226 and 227.

The language first appeared in Statutes of 1891, Chapter 181, page 262 (eff. March 21, 1891),[53] and was enacted in response to a condition attached by Congress in statutes appropriating money for the acquisition of sites and the construction of post office buildings in California. For example, the Act of February 28, 1885, 23 Stat. 336, appropriated $100,000.00 for site acquisition and construction costs of a post office building at Sacramento, California, provided "that no money appropriated for the purpose shall be available . . . until the State of California shall have ceded to the United States exclusive jurisdiction over the same . . . for all purposes except the administration of the criminal laws of said State and the service of civil process therein." Identical conditions were contained in acts appropriating money for site acquisition and construction costs for post office buildings in Stockton, California (Act of January 12, 1891, 26 Stat. 711) and in San Jose, California (Act of April 28, 1890, 26 Stat. 73). The United States Attorney General had given his opinion in 1893 that the identical phrase in congressional acts appropriating money for public buildings[54] ". . . left to the State the administration of its criminal laws over the premises acquired by the

[53] The provisions of Statutes of 1891, Chapter 181, page 262, are set forth in the appendix at p. 210.

[54] Identical provisions reserving state criminal jurisdiction appeared in the Acts of: May 26, 1880, 21 Stat. 142; May 25, 1882, 22 Stat. 94; July 7, 1882, 22 Stat. 152; July 12, 1882, 22 Stat. 161; January 13, 1885, 23 Stat. 282; March 3, 1887, 24 Stat. 544; August 21, 1888, 25 Stat. 444; April 26, 1890, 26 Stat. 66; May 16, 1890, 22 Stat. 114; and January 21, 1891, 26 Stat. 724.

General Government, and consequently the cognizance of offenses against its laws committed hereon, as fully as the same existed before such acquisition." 20 Ops. Atty. Gen. 611, 613 (June 7, 1893); accord 8 Ops. Atty. Gen. 418, 419 (February 27, 1857); 24 Ops. Atty. Gen. 617, 619 (April 16, 1903); 31 Ops. Atty. Gen. 265, 267-268 (April 8, 1918). Thus, at the time the Legislature enacted the 1891 statute, it understood that the statute reserved to California the power to enforce its criminal laws with respect to offenses committed on such lands.

In *Bowen* v. *Johnston*, 306 U.S. 19, 28-29 (1934), it was held that the provision in a Georgia cession statute (1 Ga. Laws, 1890-91, p. 199) "that the State shall retain its . . . criminal jurisdiction over persons and citizens in said ceded territory . . ." reserved to the State of Georgia criminal jurisdiction over the Chickamauga and Chattanooga National Park. And in *Collins* v. *Yosemite Park Co.*, 304 U.S. 518, 527 (1938), the statement is made that "As the Act of March 31, 1891 (Calif. Stats. 1891, Ch. 181, p. 262), was then in force, . . . exclusive jurisdiction, with the exception of the right to administer criminal laws and serve process, passed to the United States, on its acceptance . . ." of the recession of Yosemite Valley and the Mariposa Big Tree Grove, made by California in Statutes of 1905, Chapter 60, page 54. Plainly, therefore, this same reservation in Section 113, the codified successor to the 1891 statute, saved to the State the power

to enforce its criminal laws with respect to offenses committed on these parcels at Oakland.

The rational of the contrary ruling in *United States* v. *Watkins* (D.C.N.D. Calif.), 22 F. 2d 437 (1927), cited by the government (Gov't. Br. 11), was overruled by *James* v. *Dravo Contracting Co.*, 302 U.S. 134, 147 (1937). The issue in *Watkins* was whether the district court had criminal jurisdiction over a homicide committed within the Presidio of San Francisco. Had the district court there recognized the State's reservation of criminal jurisdiction in the 1891 statute as had the United States Attorney General (e.g. 8 Ops. Atty. Gen. 418, 419 (February 27, 1857); 20 Ops. Atty. Gen. 611, 613 (June 7, 1893); 24 Ops. Atty. Gen. 617, 619 (April 16, 1903); 31 Ops. Atty. Gen. 265, 267-268 (April 8, 1918)), it would have been ousted of jurisdiction since under Revised Statutes, Section 5339, the district court's power extended only to homicides committed on lands under the "exclusive jurisdiction of the United States." To avoid this problem, the court adopted the *obiter dictum* in *Fort Leavenworth R.R. Co.* v. *Lowe*, 114 U.S. 534, 537-538 (1885) that a state cannot qualify its cession of jurisdiction, and interpreted the phrase "administration of the criminal laws of this State" as though it read "service of criminal process." 22 F. 2d 437, 438-439. This *dicta* in the *Leavenworth* case was expressly disapproved in *James* v. *Dravo Contracting Co.*, 302 U.S. 134, 146-147 (1937), and the erroneous construction of the statute in *Watkins* must give way to the rule of *Bowen* v. *Johnston*,

306 U.S. 19, and *Collins* v. *Yosemite Park Co.*, 304 U.S. 518.

For the reasons stated, California plainly exercises criminal jurisdiction over offenses committed on the Oakland Army Terminal, and the State may enforce the penal provisions of the milk stabilization act against contractors delivering milk to the installation. Agr. Code, Sec. 4410. See *Commonwealth* v. *Rohrer*, 37 Pa. D. and C. 410 (1937), where a contractor was criminally prosecuted for selling milk to the Veterans Hospital at Coatesville, Pennsylvania, in violation of the Pennsylvania milk stabilization act.

Section 126 reserved in addition to the State's criminal jurisdiction under Section 113, "the State's entire power of taxation" and reserved "to all persons residing on such land all civil and political rights, including the right of suffrage, which they might have were this consent not given." These reservations of state jurisdiction are also antithetical to the finding that "exclusive jurisdiction" was transferred over Oakland to the United States. See *Wilson* v. *Cook*, 327 U.S. 474, 486 (1946).

With presumed notice that the state cession of "jurisdiction" transfers only concurrent, civil and criminal jurisdiction instead of exclusive jurisdiction (*In re Kelly*, C.C.E.D. Wis., 71 Fed. 545, 552-553 (1895), the Secretary of War in his notice of April 21, 1949 (R. 372), and in his application for state consent to acquire these parcels dated July 5, 1950 (R. 368), stated that the government accepted "jurisdiction"

over these certain parcels at Oakland. As contrasted to the earlier blanket notices accepting "exclusive jurisdiction" (R. 339, 374), this letter accepting *concurrent* jurisdiction under Revised Statutes Section 355, as amended, was tacit recognition that Sections 113 and 126 reserved state criminal and civil jurisdiction over these parcels at Oakland. The court below, therefore, erred in enjoining enforcement of the state statute as applied to contractors delivering milk to Oakland since California exercises state jurisdiction over the Castle installation. *Penn Dairies, Inc.* v. *Milk Control Comm'n.*, 318 U.S. 261 (1943).

Lastly, if jurisdiction over Oakland was transferred to the United States on October 5, 1950, as found by the trial court (190 F. Supp. 645, 650-652), then the previously enacted 1935 California milk stabilization act was assimilated at Oakland, thus allowing state enforcement of the act against contractors delivering milk to the installation. *Pacific Coast Dairy* v. *Dept.*, 318 U.S. 285, 293 (1943); *Stewart & Co.* v. *Sadrakula*, 309 U.S. 94, 99 (1940).

III. CALIFORNIA CAN CONSTITUTIONALLY ENFORCE ITS MINIMUM DAIRY FARMER MILK PRICE REGULATIONS AGAINST CONTRACTORS BUYING FROM DAIRYMEN AND RESELLING TO THE UNITED STATES.

The district court enjoined enforcement of the state's minimum milk producer price regulations against contractors buying milk from dairy farmers where such milk was subsequently delivered to the

Castle, Travis and Oakland reservations. R. 66a, 68a. Analysis of the grounds for decision given by the trial court show that they do not justify the action taken. For example, it found that Agricultural Code, Sections 4280(f) and 4361,[13] imposed and unconstitutional prohibition on the Federal Government. 190 F. Supp. 645, 657. But these sections by their express terms pertain only to wholesale and retail minimum milk prices. The trial court also held that the state's minimum wholesale milk price regulations could not be constitutionally enforced against contractors delivering milk to the Castle, Travis and Oakland installations because these bases were located on land within exclusive federal jurisdiction. 190 F. Supp. 645, 648, 654. Yet neither of these trial court conclusions should be applied (although the district court did so) to the state's minimum milk producer regulations which impose price control at the point where the producer transfers either possession or the property interest in the milk to the handler. *United Milk Producers* v. *Cecil*, 47 C.A. 2d 758, 768-769, 118 P. 2d 830 (1941). The transaction controlled by state law, therefore occurs at the dairy ranch or at the handler's processing plant and not on the military reservation, and, therefore, plainly takes place at a point within state jurisdiction. This conclusion applies with equal force, of course, to the distributor's sale of fluid milk to the government which often takes place on what is un-

[13] Calif. Agr. Code, Sec. 4280(f) and 4361 are set forth in footnotes 13 and 14, *supra*, p. 56, and in the appendix at pp. 186 and 196.

questionably state territory although delivery may later be made at the federal installation.

In a comparable situation, the Court held that the Pennsylvania milk producer price regulations could constitutionally be enforced against a handler who, after purchasing in Pennsylvania, shipped the raw milk in interstate commerce for resale in New York City. *Milk Board* v. *Eisenberg Co.*, 306 U.S. 346 (1939). The burden imposed by the state regulation was deemed constitutionally permissible under the Commerce Clause because: "If dealers conducting receiving stations in various localities in Pennsylvania were free to ignore the requirements of the statute on the ground that all or a part of the milk they purchase is destined to another state the uniform operation of the statute locally would be crippled and might be impracticable." 306 U.S. 346, 353. The applicability of this premise to the California stabilization act is obvious since the government purchases 6 percent of the state's supply of milk. R. 348.

In its brief, in this Court, the government conceded "as a matter of procurement policy" that these dairy farmer price regulations may be validly enforced against contractors buying milk from California dairymen and reselling to the United States. Gov't. Br. 5. This position was also taken in *Penn Dairies, Inc.* v. *Milk Control Comm'n.*, 318 U.S. 261 (1943), where the government raised no question "as to the right of Pennsylvania to fix prices at the producer-distributor level for milk which ultimately is sold to

the United States." Brief for the United States, *Penn Dairies, Inc.* v. *Milk Control Comm'n.*, Supreme Court of the United States, Oct. Term, 1942, No. 399, p. 2, fn. 1. These concessions acknowledging the constitutionality of state milk producer price regulations, reflect congressional policy to assure a stabilized annual production of adequate supplies of milk in the United States and to stabilize the economy of dairy farmers at a level which will provide a fair return for their labor and investment. Sec. 204(a), Agricultural Act of 1954, 68 Stat. 899. It follows that the California minimum milk producer price regulations are constitutional as applied to contractors reselling to the United States, irrespective of the jurisdictional status of the contested parcels of land at the Castle, Travis and Oakland installations where delivery of the milk is made. *Penn Dairies, Inc.* v. *Milk Control Comm'n.*, 318 U.S. 261 (1943).

IV. THE DISTRICT COURT COMMITTED PREJUDICIAL ERROR IN PROCEEDING TO ENTER FINAL JUDGMENTS WITHOUT TRIAL OR THE TAKING OF EVIDENCE AND THE JUDGMENTS MUST BE REVERSED.

In action 39030 (Oakland) filed March 30, 1960 (R. 7), the district court by *ex parte* restraining order enjoined the continuance of the state's enforcement action filed in the state court (Alameda County, Superior Court of California) the previous February 15, 1960. Notwithstanding state officers' objections and denials that the United States exercises exclusive juris-

diction over Oakland and that irreparable injury was threatened as set forth in the affidavits and by answer (R. 156, 183, 197, 341, 657, 661), the district court on motion for preliminary injunction entered final judgment holding the statute unconstitutional as applied without trial or the taking of evidence. R. 666; 190 F. Supp. 645, 659-660. However, the issue before the trial court on motion for preliminary injunction was not the constitutionality of the state enactment, but whether the state court proceedings would result in such irreparable injury to the United States that preliminary injunction should issue pending a trial on the merits. *Mayo* v. *Canning Co.*, 309 U.S. 310, 316 (1940). Similarly, the final injunctions issued April 17, 1961 (R. 668), in action No. 39073 (Castle and Travis) restrained state officers from proceeding in the District Court of Appeal for California to obtain appellate interpretation of the state statutes applicable to the Castle installation. R. 550, 656. As in action No. 39030, state court jurisdiction first attached to the controversy since the Superior Court action was filed February 5, 1960 (R. 790), while the government's injunctive action for milk delivered to Castle was filed March 22, 1960. R. 192. Thus the district court on motions for summary judgment closed the doors of the state courts to the State despite the denials by state officers' answers and affidavits that (1) California had ceded exclusive jurisdiction to the United States over

Castle and Travis, and (2) that the state's enforcement actions in the state courts threatened irreparable injury to the government. R. 156, 183, 197, 355, 521, 620, 657, 661. In the context of the serious errors of fact made in the lower court's findings, the denials made in state officers' answers and affidavits present triable issues of fact which the trial court should have resolved only after trial. *Colorado v. Toll*, 268 U.S. 228, 231-232 (1925); *Beal v. Missouri Pacific R. Co.*, 312 U.S. 45, 50-51 (1941). Further, the precipitous action of the district court violated the principle that, absent express authorization by Congress, "the Federal Court cannot, of course, interfere in a case where the proceedings were already pending in a state court." *Ex parte Young*, 209 U.S. 123, 162 (1908); *Wilson v. Schnettler*, 365 U.S. 381, 384 (1961).

V. THE DISTRICT COURT ERRED IN ENTERING FINAL JUDGMENT WITHOUT AWAITING A PENDING CONSTRUCTION BY THE STATE COURTS OF APPLICABLE STATE LAW.

On the date of the trial court's judgments there was pending in the state appellate courts the same issues as are posed here. *Waring v. Milk Producers Ass'n.*, District Court of Appeal of California, Third Appellate District, No. 10485. R. 550, 656. Notwithstanding this pendency, the district court on motion for preliminary injunction in action No. 39030 and on motion for summary judgment in action No. 39073, held the state act unconstitutional, as ap-

plied on the basis of *its construction* of (1) the state milk stabilization act, (2) of the state statutes consenting to the federal purchase of land, and (3) of the cession of jurisdiction statutes.

Martin v. *Creasy*, 360 U.S. 219 (1959), provides a statement of the general scope of the doctrine of abstention. There, the court stated that "The concerns which have traditionally counseled a federal court to stay its hand are the desirability of avoiding unseemly conflict between two sovereignties, the unnecessary impairment of state functions, and the premature determination of constitutional questions." 360 U.S. 219, 224. Such conflict appears in full measure in this case where the court below construed the state milk stabilization act to "place a prohibition on the Federal Government" (190 F. Supp. 645, 657) in direct conflict with the decision of the Supreme Court of California that the milk stabilization "act regulates not the army but the distributors." *Pacific Coast Dairy* v. *Dept.*, 19 C. 2d 818, 830 (1942), rev'd. on another ground, 318 U.S. 285 (1943). Conflict between the state and federal courts is also shown by the district court adjudging that the United States exercises exclusive jurisdiction over Castle Air Force Base (190 F. Supp. 645, 653), while the Superior Court of the State of California for the County of Merced, ruled that California exercises jurisdiction over Castle. *Warne* v. *Milk Producers Association*, Merced County, Superior Court of California, No. 28301. R. 550. Further, the foregoing

sections of this brief plainly show that substantial constitutional questions regarding the proper construction of these state statutes are posed here which should not have been resolved by the district court on the basis of preliminary guesses regarding local law. *Spector Motor Service* v. *McLaughlin*, 323 U.S. 101, 105 (1944). This danger is illustrated by the decision in *Standard Oil Co.* v. *Johnson*, 10 Cal. 2d 758, 769 (1938), where the Supreme Court of California refused to follow the interpretation of the California statutes dealing with the transfer of jurisdiction over Yosemite Valley to the United States made in *Yosemite Park Co.* v. *Collins*, D.C.N.D. Calif., 1937, 20 F. Supp. 1009. The district court was thereupon reversed, *sub nom. Collins* v. *Yosemite Park Co.*, 304 U.S. 518 (1938), the Supreme Court of the United States reaching the same conclusion as had the Supreme Court of California.

Abstention from the exercise of jurisdiction is appropriate here because the interpretation of the milk stabilization act is a local issue as to which the state court's decision is binding on the federal courts. *Am. Federation of Labor* v. *Watson*, 327 U.S. 582, 595-596 (1946). While the interpretation of the state's consent to purchase land and cession of jurisdiction statutes may constitute a federal as well as a local question, yet in the resolution of such question the federal courts in order to promote state-federal relations "give great weight to the views of the state court as

to the intent and limitations of the statute in granting consent and cession." *Mason Co.* v. *Tax Comm.*, 302 U.S. 186, 207 (1937). If the California milk stabilization act does not constitute a prohibition on the United States or its officers, then the court need not reach the issue of the constitutionality of the state milk act under *Calif. Comm'n.* v. *United States*, 355 U.S. 534 (1958). And if California exercises state jurisdiction over the Castle, Travis and Oakland installations, then no issue would be posed as to the constitutionality of the state milk stabilization statute under *Pacific Coast Dairy* v. *Dept.*, 318 U.S. 285 (1943). Thus, abstention from the exercise of jurisdiction is appropriate in these actions.

There is now pending a motion to remand to the Superior Court of California, the action for declaratory judgment *People* v. *Cuno*, United States District Court, No. Dist. of Calif., So. Div., No. 39080. This action, which names the procurement officers at Castle and Travis as defendants, was originally filed in the Superior Court of California for Solano County, and asks that the Superior Court interpret the state milk stabilization act, the State's consent to purchase land statute, and the cession of jurisdiction statute in the light of the federal constitutional objections raised by the government. A remand of this declaratory judgment action to the state courts, while the district courts stays its hand in the instant actions, would

expose these enactments to state court construction, or limiting interpretation, before the federal courts pass on the constitutionality of the State's milk stabilization act. See *Leiter Minerals, Inc.*, v. *United States*, 352 U.S. 220, 228-230 (1957). In the alternative, the government may deem it more expeditious to intervene in the cases now in the California appellate courts in which these same issues are posed. *Warne* v. *Mill. Producers Ass'n.*, District Court of Appeal, Third Appellate District, No. 10185 (Castle Air Force Base); *Paul* v. *Allied Dairymen, Inc.*, District Court of Appeal, Fifth Appellate District, No. 147 (Vandenberg Air Force Base, Santa Barbara County).

The resulting judgment would then not be grounded on a forecast of state law, but upon judicial precedent which is the complete product of the State, the enactment as phrased by the State Legislature, and as construed by the state courts. *Harrison* v. *N.A.A.C.P.*, 360 U.S. 167, 178 (1959). For the reasons stated, the judgment should be reversed with directions to abstain from the exercise of jurisdiction pending clarification of local law by the state courts.

CONCLUSION

For the reasons stated, the court should reaffirm that a state may constitutionally enforce its milk stabilization act against contractors with the United States under *Penn Dairies, Inc. v. Milk Control Comm'n.*, 318 U.S. 261, and should declare that California exercises jurisdiction over the Castle, Travis and Oakland military installations. The judgments below, therefore, should be reversed.

Respectfully submitted.

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APPENDIX

I. PROCEEDINGS IN THE DISTRICT COURT.

[Title of Court Omitted]

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. CHARLES PAUL, Director of Agriculture of the State of California, and STANLEY MOSK, Attorney General, State of California, *Defendants-Appellants.*	Civil No. 39030 and 39073

ORDER EXTENDING TIME FOR DOCKETING AND FILING RECORD IN THE UNITED STATES SUPREME COURT

Based on the affidavit of JOHN FOURT filed herewith and on application of counsel for defendants-appellants, and good cause appearing:

IT IS HEREBY ORDERED pursuant to Rule 13 of the Revised Rules of the Supreme Court of the United States, that the time within which the appellants named above may docket the case and file the record thereof with the Clerk of the Supreme Court of the United States be, and it is hereby enlarged, to and including July 24, 1961.

Dated:

GEORGE B. HARRIS
United States District Judge

II. PERTINENT CONSTITUTIONAL AND FEDERAL STATUTORY PROVISIONS.

A. Constitution of the United States, Article I, Section 8, provides in part, as follows:

"The Congress shall have power . . .

"To exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular States, and the acceptance of Congress, become the seat of the government of the United States, and to exercise like authority over all places purchased by the consent of the Legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings;"

B. Federal procurement statutes: The statutes governing procurement by the federal defense agencies are found in 10 U.S.C. sections 2301-2314 which provide:

"2301. Declaration of Policy.

It is the policy of Congress that a fair proportion of the purchases and contracts made under this chapter be placed with small business concerns."

"2302. Definitions.

In this chapter—

(1) "Head of an agency" means the Secretary, the Under Secretary, or any Assistant Secretary of the Army, Navy, or Air Force; the Secretary of the Treasury; or the Administrator of the National Aeronautics and Space Administration.

(2) "Negotiate" means make without formal advertising.

(3) "Formal advertising" means advertising as prescribed by section 2305 of this title."

"2303. Applicability of chapter.

(a) This chapter applies to the purchase, and contract to purchase, by any of the following agencies, for its use or otherwise, of all property named in subsection (b), and all services, for which payment is to be made from appropriated funds.

(1) The Department of the Army.
(2) The Department of the Navy.
(3) The Department of the Air Force.
(4) The Coast Guard.
(5) The National Aeronautics and Space Administration.

(b) This chapter does not cover land. It covers all other property including—

(1) public works;
(2) buildings;
(3) facilities;
(4) vessels;
(5) floating equipment;
(6) aircraft;
(7) parts;
(8) accessories;
(9) equipment; and
(10) machine tools.

(c) The provisions of this chapter that apply to the procurement of property apply also to contracts for its installation or alteration."

"2304. Purchases and contracts; formal advertising; exceptions.

(a) Purchases of and contracts for property or services covered by this chapter shall be made by

formal advertising. However, the head of an agency may negotiate such a purchase or contract if—

(1) it is determined that such action is necessary in the public interest during a national emergency declared by Congress or the President;

(2) the public exigency will not permit the delay incident to advertising;

(3) the aggregate amount involved is not more than $2,500;

(4) the purchase or contract is for personal or professional services;

(5) the purchase or contract is for any service by a university, college, or other educational institution;

(6) the purchase or contract is for property or services to be procured and used outside the United States and the Territories, Commonwealths, and possessions;

(7) the purchase or contract is for medicine or medical supplies;

(8) the purchase or contract is for property for authorized resale;

(9) the purchase or contract is for perishable or nonperishable subsistence supplies;

(10) the purchase or contract is for property or services for which it is impracticable to obtain competition;

(11) the purchase or contracts is for property or services that he determines to be for experimental, developmental, or research work, or for making or furnishing property for experiment, test, development, or research;

(12) the purchase or contract is for property or services whose procurement he determines should

not be publicly disclosed because of their character, ingredients, or components;

(13) the purchase or contract is for equipment that he determines to be technical equipment whose standardization and the interchangeability of whose parts are necessary in the public interest and whose procurement by negotiation is necessary to assure that standardization and interchangeability;

(14) the purchase or contract is for technical or special property that he determines to require a substantial initial investment or an extended period of preparation for manufacture, and for which he determines that formal advertising and competitive bidding might require duplication of investment or preparation already made or would unduly delay the procurement of that property; or

(15) the purchase or contract is for property or services for which he determines that the bid prices received after formal advertising are unreasonable as to all or part of the requirements, or were not independently reached in open competition, and for which (A) he has notified each responsible bidder of intention to negotiate and given him reasonable opportunity to negotiate; (B) the negotiated price is lower than the lowest rejected bid of any responsible bidder, as determined by the head of the agency; and (C) the negotiated price is the lowest negotiated price offered by any responsible supplier;

(16) he determines that (A) it is in the interest of national defense to have a plant, mine, or other facility, or a producer, manufacturer, or other supplier, available for furnishing property or services in case of a national emergency; or (B) the

interest of industrial mobilization in case of such an emergency, or the interest of national defense in maintaining active engineering, research, and development, would otherwise be subserved; or

(17) negotiation of the purchase or contract is otherwise authorized by law.

(b) The data respecting the negotiation of each purchase or contract under clauses (1) and (7)—(17) of subsection (a) shall be kept by the contracting agency or six years after the date of final payment on the contract.

(c) This section does not authorize—

(1) the negotiation of a contract to construct or repair any building, road, sidewalk, sewer main, or similar item, unless—

(A) it is made under clauses (1)—(3), (10)—(12, or (15) of subsection (a); or

(B) it is to be performed outside the United States; or

(2) the erection, repair, or furnishing of any public building or public improvement.

(d) Whenever the head of the agency determines it to be practicable, such advance publicity as he considers suitable with regard to the property involved and other relevant considerations shall be given for a period of at least 15 days before making a purchase of or contract for property, or a service, under clause (7) or (8) of subsection (a) involving more than $10,000.

(e) A report shall be made to Congress on May 19 and November 19 of each year, of the purchases and contracts made under clauses (11) and (16) of sub-

section (a) during the period since the date of the last report. The report shall—

(1) name each contractor;

(2) state the amount of each contract; and

(3) describe, with consideration of the national security, the property and services covered by each contract.

(f) For the purposes of the following laws, purchases or contracts negotiated under this section shall be treated as if they were made with formal advertising:

(1) Sections 35—45 of title 41.

(2) Sections 276a—276a-5 of title 40.

(3) Sections 324 and 325a of title 40."

"2305. Formal advertisements for bids; times; opening; award; rejection.

(a) Whenever formal advertising is required under section 2304 of this title, the advertisement shall be made a sufficient time before the purchase or contract. The specifications and invitations for bids shall permit such free and full competition as is consistent with the procurement of the property and services needed by the agency concerned.

(b) The specification in invitations for bids must contain the necessary language and attachments, and must be sufficiently descriptive in language and attachments, to permit full and free competition. If the specifications in an invitation for bids do not carry the necessary descriptive language and attachments, or if those attachments are not accessible to all competent and reliable bidders, the invitation is invalid and no award may be made.

(c) Bids shall be opened publicly at the time and place stated in the advertisement. Awards shall be made with reasonable promptness by giving written notice to the responsible bidder whose bid conforms to the invitation and will be the most advantageous to the United States, price and other factors considered. However, all bids may be rejected if the head of the agency determines that rejection is in the public interest.

(d) If the head of the agency considers that any bid received after formal advertising evidences a violation of the antitrust laws, he shall refer the bid to the Attorney General for appropriate action."

C. The Lanham Act, 54 Stat. 1125, authorizing the purchase and improvement of land for civilian defense housing provides:

SECTION 1. In order to provide housing for persons engaged in national-defense activities, and their families, in those areas or localities in which the President shall find that an acute shortage of housing exists or impends which would impede national-defense activities and that such housing would not be provided by private capital when needed, the Federal Works Administrator (hereinafter referred to as the 'Administrator') is authorized,

"(a) To acquire prior to the approval of title by the Attorney General (without regard to sections 1136, as amended, and 3709 of the Revised Statutes) improved or unimproved lands or interests in lands by purchase, donation, exchange, lease (without regard to section 322 of the Act of June 30, 1932 (47 Stat. 412), as amended, the Act of March 3, 1877 (19 Stat. 370), or any time limit on the availability of funds for the payment of rent), or condemnation (including

proceedings under the Acts of August 1, 1888 (25 Stat. 357), March 1, 1929 (45 Stat. 1415), and February 26, 1931 (46 Stat. 1421)).

"(b) By contract or otherwise (without regard to sections 1136, as amended, and 3709 of the Revised Statutes, section 322 of the Act of June 30, 1932 (47 Stat. 412), or any Federal, State, or municipal laws, ordinances, rules, or regulations relating to plans and specifications or forms of contract, the approval thereof or the submission of estimates therefor) prior to the approval of title by the Attorney General to make surveys and investigations, plan, design, construct, remodel, extend, repair, or demolish structures, buildings, improvements, and community facilities, on lands or interests in lands acquired under the provisions of subsection (a) hereof or on other lands of the United States which may be available (transfers of which for this purpose by the Federal agency having jurisdiction thereof are hereby authorized notwithstanding any other provisions of law), provide proper approaches thereto, utilities, and transportation facilities, and procure necessary materials, supplies, articles, equipment, machinery, and do all things necessary in connection therewith to carry out the purposes of this Act: *Provided*, That the cost-plus-a-percentage-of-cost system of contracting shall not be used, but this proviso shall not be construed to prevent the use of the cost-plus-a-fixed-fee form of contract: *Provided*, That the cost per family dwelling unit shall not exceed an average of $3,000 for those units located within the continental United States nor an average of $4,000 for those located elsewhere, and the cost of no family dwelling unit shall exceed $3,950 within the continental United States or $4,750 else-

where, exclusive of expenses of administration, land acquisition, public utilities, and community facilities, and the aggregate cost of community facilities shall not exceed 3 per centum of the total cost of all projects.

"SEC. 2. As used in this Act (a) the term 'persons engaged in national-defense activities' shall include (1) enlisted men in the naval or military services of the United States; (2) employees of the United States in the Navy and War Departments assigned to duty at naval or military reservations, posts, or bases; (3) workers engaged or to be engaged in industries connected with and essential to the national defense; (b) the term 'Federal agency' means any executive department or office (including the President), independent establishment, commission, board, bureau, division, or office in the executive branch of the United States Government, or other agency of the United States, including corporations in which the United States owns all or a majority of the stock, directly or indirectly.

* * * * *

"SEC. 4. When the President shall have declared that the emergency declared by him on September 8, 1939, to exist, has ceased to exist (a) the authority contained in section 1 hereof shall terminate except with respect to contracts on projects previously entered into or undertaken and court proceedings then pending, and (b) property acquired or constructed under this Act shall be disposed of as promptly as may be advantageous under the circumstances and in the public interest.

* * * * * *

"SEC. 7. Notwithstanding any other provisions of law, whether relating to the acquisition, handling, or disposal of real or other property by the United States or to other matters, the Administrator, with respect to any property acquired or constructed under the provisions of this Act, is authorized by means of Government personnel, selected qualified private agencies, or public agencies (a) to deal with, maintain, operate, administer, and insure; (b) to pursue to final collection by way of compromise or otherwise, all claims arising therefrom; (c) to rent, lease, exchange, sell for cash or credit, and convey the whole or any part of such property and to convey without cost portions thereof to local municipalities for street or other public use: *Provided*, That any such transaction shall be upon such terms, including the period of any lease, as may be deemed by the Administrator to be in the public interest: *Provided further*, That the Administrator shall fix fair rentals, on projects developed pursuant to this Act, which shall be within the financial reach of persons engaged in national defense: *Provided further*, That any lease authorized hereunder shall not be subject to the provisions of section 321 of the Act of June 30, 1932 (47 Stat. 412).

"SEC. 8. In carrying out the provisions of this Act the Administrator is authorized to utilize and act through the Federal Works Agency and other Federal agencies and any local public agency, with the consent of such agency, and any funds appropriated pursuant to this Act shall be available for transfer to any such agency in reimbursement therefor. Nothing in this Act shall be construed to prevent the Administrator from employing or utilizing the professional services of private persons, firms, or corporations.

"SEC. 9. The Administrator may enter into any agreements to pay annual sums in lieu of taxes to any State or political subdivision thereof, with respect to any real property acquired and held by him under this Act, including improvements thereon. The amount so paid for any year upon any such property shall not exceed the taxes that would be paid to the State or subdivision, as the case may be, upon such property if it were not exempt from taxation.

"SEC. 10. Notwithstanding any other provision of law, the acquisition by the Administrator of any real property pursuant to this Act shall not deprive any State or political subdivision thereof of its civil and criminal jurisdiction in and over such property, or impair the civil rights under the State or local law of the inhabitants on such property.

"SEC. 11. The Administrator is authorized to make such rules and regulations as may be necessary to carry out the provisions of this Act, and shall establish reasonable standards of safety, convenience, and health."

* * * * * *

D. The Joint Resolution of Congress of September 11, 1841, 5 Stat. 468, provided:

"*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled*, That it shall be the duty of the Attorney General of the United States to examine into the titles of all the lands or sites which have been purchased by the United States, for the purpose of erecting thereon armories, arsenals, forts, fortifications, navy yards, custom-houses, light-houses, or other public buildings of any kind whatever, and report his opinion as to the validity of the title in each case to the President of the United States.

"2. *Resolved*, That it shall be the duty of all the officers of the United States having any of the title-papers to the property aforesaid in their possession, to furnish them forthwith to the Attorney General, to aid him in the investigation aforesaid.

"3. *Resolved*, That no public money shall be expended upon any site or land hereafter to be purchased by the United States for the purposes aforesaid, until the written opinion of the Attorney General shall be had in favor of the validity of the title, and also the consent of the Legislature of the State in which the land or site may be shall be given to said purchaser.

"4. *Resolved*, That it shall be the duty of the District Attorneys of the United States, upon the application of the Attorney General, to furnish any assistance or information in their power in relation to the titles of the public property aforesaid lying within their respective districts.

"5. *Resolved*, That it shall be the duty of the Secretaries of the Executive Departments, upon the application of the Attorney General, to procure any additional evidence of title which he may deem necessary, and which may not be in the possession of the officers of Government; the expense of procuring which to be paid out of the appropriations made for the contingencies of the Departments respectively.

"6. *Resolved*, That it shall be the duty of the Secretaries of the Executive Departments, respectively, under whose direction any lands for the purposes aforesaid may have been purchased, and over which the United States do not possess jurisdiction, to apply to the Legislatures of the States in which the lands are situated, for a cession of jurisdiction, and in case of

refusal, to report the same to Congress at the commencement of the next session thereafter."

Revised Statutes, Section 355, as enacted 1875:

"No public money shall be expended upon any site or land purchased by the United States for the purposes of erecting thereon any armory, arsenal, fort, fortification, navy-yard, custom-house, light-house, or other public building, of any kind whatever, until the written opinion of the Attorney-General shall be had in favor of the validity of the title, nor until the consent of the legislature of the State in which the land or site may be, to such purchase, has been given. The district attorneys of the United States, upon the application of the Attorney-General, shall furnish any assistance or information in their power in relation to the titles of the public property lying within their respective districts. And the Secretaries of the Departments, upon the application of the Attorney-General, shall procure any additional evidence of title which he may deem necesary, and which may not be in the possession of the officers of the Government, and the expense of procuring it shall be paid out of the appropriations made for the contingencies of the Departments respectively."

Revised Statutes, Section 355, as amended by the Act of October 9, 1940, 54 Stat. 1083, provides:

"SEC. 355. No public money shall be expended upon any site or land purchased by the United States for the purposes of erecting thereon any armory, arsenal, fort, fortification, navy yard, custom-house, lighthouse, or other public building of any kind whatever, until the written opinion of the Attorney General shall be had in favor of the validity of the title.

"'Notwithstanding the provisions of this or any other law, whenever the average value of any lands or interests in land to be acquired by or on behalf of the United States under a single option or contract of sale does not exceed $10 per acre (hereinafter referred to as "low-value lands"), the title may be accepted subject to such infirmities as, in the opinion of the Attorney General, may, without jeopardizing the interests of the United States, be left for removal by condemnation or other appropriate proceedings, if and when necessary: *Provided*, That the total value of any lands or interests to be acquired under a single option or contract of sale subject to an infirmity does not exceed $3,500. No public money shall hereafter be expended for the acquisition of such low-value lands or interests in land by or on behalf of the United States for any purpose until the written opinion of the Attorney General has been had approving the title subject, if expedient, to infirmities as herein provided. However, no money in excess of $2,500 shall be expended for the construction of buildings, works, or other improvements (except roads, trails, and fire-protection improvements) on any site, tract, or parcel of land the title to which is subject to infirmities, until the written opinion of the Attorney General in favor of the validity of the title has been had as in the case of other lands. For the purpose of this Act, values of lands and interests in land shall be determined by the consideration paid or to be paid.

"'The Attorney General is hereby authorized to approve the title to easements or rights-of-way to be acquired by or on behalf of the United States, subject to such infirmities as, in his opinion, will not jeopardize the interests of the United States.

"'Nothing in this Act shall be construed to limit the authority now or hereafter delegated to any officer in exercising the power of eminent domain for or on behalf of the United States, to take title to or possession of or to expend money for or upon any land or interest in land, or to expend money as security for an ultimate award in advance of final judgment in any proceedings to determine just compensation; nor shall this Act be construed to preclude any acquiring agency from expending money for the erection of any preliminary and temporary structure upon any land.

"'The head or other authorized officer of any department, independent establishment, or agency, shall procure any evidence of title which the Attorney General may deem necessary, and the expenses of procurement, except where otherwise authorized by law or provided by contract, may be paid out of the appropriations for the acquisition of land or out of the appropriations made for the contingencies of the acquiring department, independent establishment, or agency.

"'The Attorney General may, in his discretion, base any opinion as to title required either by this Act or any other law upon either or both of the following: Certificates of title of title companies or such evidence of title as he may deem satisfactory.

"'The foregoing provisions of this section shall not be construed to affect in any manner any existing provisions of law which are applicable to the acquisition of lands or interests in land by the Tennessee Valley Authority; and nothing in this section shall be construed to affect in any manner any authority which the Secretary of War, the Chief of Engineers, or the Secretary of the Interior have under the provisions of law in force on the date this section as amended takes ef-

fect with respect to the approval by them of title to land or interests in land acquired by the War Department or the Department of the Interior, as the case may be. Nor shall the foregoing provisions of this section, or the provisions of any other law, be construed to require any opinion of the Attorney General in connection with the acquisition or improvement of easements and rights-of-way for military or naval purposes; or for the acquisition or improvement of easements and rights-of-way by the Department of Agriculture for forest and other conservation purposes where the cost of any such easement of right-of-way acquired under a single instrument of conveyance and the cost of any improvement thereon does not exceed $2,500; and the Attorney General may, in his discretion, waive the requirement for his opinion in connection with the acquisition or improvement of easements and rights-of-way for other purposes when, in his opinion, such waiver will not jeopardize the interests of the United States.

"'Notwithstanding any other provision of law, the obtaining of exclusive jurisdiction in the United States over lands or interests therein which have been or shall hereafter be acquired by it shall not be required; but the head or other authorized officer of any department or independent establishment or agency of the Government may, in such cases and at such times as he may deem desirable, accept or secure from the State in which any lands or interests therein under his immediate jurisdiction, custody, or control are situated, consent to or cession of such jurisdiction, exclusive or partial, not theretofore obtained, over any such lands or interests as he may deem desirable and indicate acceptance of such jurisdiction on behalf of the United States by filing a notice of such acceptance with the

Governor of such State or in such other manner as may be prescribed by the laws of the State where such lands are situated. Unless and until the United States has accepted jurisdiction over lands hereafter to be acquired as aforesaid, it shall be conclusively presumed that no such jurisdiction has been accepted.'"

III. PERTINENT CALIFORNIA STATUTORY PROVISIONS AND LEGISLATIVE HISTORY.

A. The California milk stabilization act derived from California Statutes of 1935, Chapter 241, page 922, as amended, is now set forth in California Agricultural Code, Division 6, Chapter 17. Relevant provisions state:

"4200. The production and distribution of fluid milk and of fluid cream and the dissemination of accurate, scientific information as to the importance of milk and other dairy products in the maintenance of a high level of public health, is hereby declared to be a business affected with a public interest. The provisions of this chapter are enacted in the exercise of police powers of this State for the purpose of protecting the health and welfare of the people of this State.

4201. It is hereby declared that fluid milk and fluid cream are necessary articles of food for human consumption; that the production and maintenance of an adequate supply of healthful milk of proper chemical and physical content, free from contamination, is vital to the public health and welfare, and that the production, transportation, processing, storage, distribution or sale of fluid milk and fluid cream in the State of California is an industry affecting the public health and welfare; that unfair, unjust, destructive and demoralizing trade practices have been carried on and are now being carried on in the production, marketing,

sale, processing or distribution of fluid milk and fluid cream, which constitute a constant menace to the health and welfare of the inhabitants of this State and tend to undermine sanitary regulations and standards of content and purity; however effectually such sanitary regulations may be enforced; that health regulations alone are insufficient to prevent disturbances in the milk industry which threaten to destroy and seriously impair the future supply of fluid milk; and to safeguard the consuming public from future inadequacy of a supply of this necessary commodity; that it is the policy of this State to promote, foster and encourage the intelligent production and orderly marketing of commodities necessary to its citizens, including milk, and to eliminate speculation, waste, improper marketing, unfair and destructive trade practices, and improper accounting for milk purchased from producers.

4202. It is recognized by the Legislature that conditions within the milk industry of this State are such that it is necessary to establish marketing areas wherein different prices and regulations are necessary, and for that purpose the Director of Agriculture of this State shall have the administrative authority, with such additional duties as are herein prescribed, after investigation and public hearing, to prescribe such marketing areas and modify the same when advisable or necessary.

4203. The foregoing statements in this article of facts, policy and application of this chapter are hereby declared a matter of legislative determination.

4204. The purposes of this chapter are:

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(b) To authorize and enable the director to prescribe marketing areas and to determine prices to pro-

ducers for fluid milk or fluid cream, or both, which are necessary due to varying factors of costs of production, health regulations, transportation and other factors in said marketing areas of this State; provided, that the cost to distributors within any marketing area, for fluid milk or fluid cream shall be uniform with all other distributors purchasing fluid milk and fluid cream of similar grade or quality under like terms and conditions.

(d) To enable the dairy industry with the aid of the State to correct existing evils, develop and maintain satisfactory marketing conditions, and bring about and maintain a reasonable amount of stability and prosperity in the production and marketing of fluid milk and fluid cream and provide means for carrying on essential educational activities.

4205. It is the intent of the Legislature that the powers conferred in this chapter shall be liberally construed. Nothing in this chapter shall be construed as permitting or authorizing the development of conditions of monopoly in the production or distribution of fluid milk or fluid cream. In the establishment of the terms and conditions under which fluid milk and fluid cream shall be purchased from producers, and under which distributors and retail stores shall sell and distribute the same, such terms and conditions shall be those which will, in the several localities and markets of the State and under the varying conditions of production and distribution insure an adequate and continuous supply of pure fresh wholesome fluid milk and fluid cream to consumers thereof at fair and reasonable prices.

Article 2. Definitions

4210. Unless the context otherwise requires, the definitions in this article govern the construction of this chapter.

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4212. "Fluid milk" means any and all whole or concentrated milk that is produced in conformity with applicable health regulations for market milk of the place where such milk is consumed.

4213. "Fluid cream" means cream as defined in this code, and any combination of cream and milk, or any fluid product of milk or cream sold under any trade name whatsoever, which is not packaged in hermetically sealed containers and which contains more than 14.6 percent milk fat and conforms to the health and sanitary regulations of the place where sold or disposed of for human consumption.

4214. "Dairy products" includes any product manufactured from milk or any derivative or product of milk.

4215. "Producer" means any person who produces fluid milk from five or more cows or goats in conformity with the applicable health regulations of the place in which it is sold, and whose fluid milk or fluid cream is received or handled by any distributor. "Producer" includes any association of producers.

4216. "Distributor" means any person, whether or not such person is a producer or an association of producers, who purchases or handles fluid milk or fluid cream for sale, including brokers, agents, copartnerships, cooperative corporations and incorporated and unincorporated associations. The definition of "distributor" shall not include any of the following: (1) Any retail store that is actively and directly not en-

gaged in processing and packaging fluid milk or fluid cream, (2) any establishment where fluid milk or fluid cream is sold only for consumption on the premises, that is not actively and directly engaged in processing and packaging fluid milk or fluid cream, (3) any person owned or controlled by one or more retail stores, or owned or controlled by one or more establishments where fluid milk or fluid cream is sold for consumption on the premises which person is not actively and directly engaged in the processing and packaging of fluid milk or fluid cream, (4) any producer who delivers fluid milk or fluid cream only to a distributor, (5) any person as to any transaction where such person purchases processed and packaged fluid milk or fluid cream, but does not thereafter physically handle such fluid milk or fluid cream for sale. The term "physically handle" as used in this subdivision shall mean: (a) to refrigerate or store or assemble individual order allotments at a fixed, established business location prior to transportation on regularly operated routes for sales of fluid milk or fluid cream on such routes to wholesale customers or directly to consumers at their homes or places of work; or (b) to transport in a mobile vehicle or unit regularly operated on routes predominately for sales of fluid milk or fluid cream on such routes to wholesale customers or directly to consumers at their homes or places of work.

4218. "Retail store" means any person or persons owning or operating a retail grocery store, restaurant, confectionery, or other similar business, where fluid milk or fluid cream is sold to the general public for consumption off the premises.

4219. "Marketing area" is any area within this State declared to be such in the manner prescribed in this chapter.

4220. "Stabilization and marketing plan" means any plan formulated and made effective by the director within the legislative standards provided by this chapter and shall include, among other things, the establishing of prices to be paid by distributors for any or all of the various classes of fluid milk or fluid cream.

4221. "Consumer" means any person who purchases fluid milk, fluid cream or dairy products for consumption.

4222. "Person" means any individual, firm, corporation, association or any other business unit.

4223. "Fluid skim milk" means skim milk as defined in this code that is derived from market milk and conforms to the health and sanitary regulations of the place where sold or disposed of for human consumption.

4225. Fluid milk may be classified for the purposes of this chapter as provided in this article.

4226. Class 1 comprises any fluid milk, fluid skim milk, or fluid cream that is supplied to consumers as market milk, market skim milk, or market cream or concentrated milk or any combination of market milk, market skim milk, and market cream, or any market milk which is not sterilized and packaged in hermetically sealed containers, or any other dairy product in which the use of market milk or any components or derivatives of market milk is required by or pursuant to the provisions of this code, or any fluid milk, fluid skim milk, fluid cream, milk-fat, or milk solids not fat used in the standardizing or fortifying of market milk or any dairy product defined herein as Class 1.

4227. Class 2 comprises any fluid milk, fluid skim milk or fluid cream which is used in the manufacture of any product for which a definition and standard is

prescribed in Division 4 of this code, except any such product which is included in Classes 1 and 3.

4228. Class 3 comprises all fluid milk, fluid skim milk, or fluid cream, which is used in the manufacture of butter, cheese other than cottage cheese, dried milk, dried skim milk, nonfat dry milk solids, defatted milk solids, dried buttermilk, or any product for which no definition and standards are prescribed in Division 4 of this code; . . .

4230. In designating and prescribing or providing methods for designating and prescribing minimum prices to be paid by distributors to producers for Classes 2 or 3 fluid milk, fluid skim milk or fluid cream, the director may take into consideration all relevant economic factors, including but not limited to the relative market values of the various products involved and the market price of other milk which may be used for the same purposes set forth in such respective classes. In no event shall any distributor pay producers or any association of producers less than the applicable price established for the usage to which the fluid milk, fluid skim milk or fluid cream purchased from them is applied; and no payment shall be made by distributors to producers or any association of producers of prices lower than those established in the applicable stabilization and marketing plan for Class 3 usage.

Article 4. General Powers of the Director

4240. The director shall enforce the provisions of this chapter and any stabilization and marketing plan initiated pursuant to the provisions of this chapter. The director is authorized and directed to adopt and promulgate rules and regulations for the proper administration and enforcement of the provisions of

this chapter. Any such rules or regulations or amendment thereof shall be adopted and promulgated by the director in conformity with the provisions of Chapter 4, (commencing with Section 11370) of Part 1 of Division 3 of Title 2 of the Government Code.

4242. The director is hereby declared to be the instrumentality of this State for the purpose of administering and enforcing the provisions of this chapter and to execute the legislative intent herein expressed, and is hereby vested with the administrative authority described in this chapter.

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4244. The director may issue licenses to distributors and require the registration of producers.

4245. The director may formulate any stabilization and marketing plan as prescribed in this chapter and declare the same effective after public hearing and reasonable notice by mail or otherwise to all producers and distributors of record with the director, affected by such plan.

4246. The director may prescribe minimum prices to be paid by distributors in accordance with a stabilization and marketing plan for fluid milk and classify said milk according to usage by distributors, pursuant to the provisions of this chapter.

4247. In the event that the director establishes under this chapter a stabilization and marketing plan for fluid milk, the director shall prescribe minimum prices to be paid by distributors for fluid cream, fluid skim milk, or milk fat, or fluid skim-milk components of such fluid milk, under such a stabilization and marketing plan, pursuant to the provisions of this chapter.

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4254. A full and accurate record of business or acts performed or of testimony taken by the director in pursuance of the provisions of this chapter shall be kept and placed on file in the office of the director.

4255. Any order of the director hereunder substantially affecting the rights of any interested party may be reviewed by any court of competent jurisdiction. Any such action must be commenced within 30 days after the effective date of the order complained of or within 30 days after the injurious effect complained of becomes reasonably apparent.

4256. The director may bring an action to enjoin the violation or the threatened violation of any provision of this chapter or of any order made pursuant to this chapter in the superior court in the county in which such violation occurs or is about to occur. There may be enjoined in one proceeding any number of defendants alleged to be violating the same provisions or orders, although their properties, interests, residence, or place of business, may be in several counties and the violations separate and distinct. Any proceeding brought hereunder shall be governed in all other respects by the provisions of Chapter 3 of Title 7 of Part 2 of the Code of Civil Procedure.

4257. The director may confer, enter into agreements, or otherwise arrange with the constituted authorities of this State, other states, or agencies of the United States with respect to plans relating to the stabilization and distribution of fluid milk and fluid cream within this State or as between this State and other states or the United States, and may exercise his powers hereunder to effectuate and enforce such plans.

Article 5. Formation and Adoption of Stabilization and Marketing Plans

4270. The director shall designate marketing areas which he deems necessary or advisable to effectuate the purposes of this chapter, and wherein he finds the conditions affecting the production, distribution and sale of fluid milk, fluid cream and fluid skim milk are reasonably uniform. The director shall have the power to establish additional areas or to modify areas theretofore established when he deems the establishment or modification of such areas necessary or advisable to effectuate the purposes of this chapter. When the director finds, after a public hearing in and for each particular marketing area under consideration for consolidation, that conditions of production and distribution are reasonably uniform in two or more such marketing areas wherein stabilization and marketing plans and minimum wholesale and minimum retail prices are in effect, he may consolidate the areas: provided, that at said hearings more than thirty-five (35) percent of the producers present who supply the areas proposed to be consolidated do not object to such consolidation.

4271. The director shall, prior to the formulation of a stabilization and marketing plan for fluid milk for any marketing area, conduct a public hearing in said area for the purpose of determining whether or not producers whose major interest in the fluid milk business is in the production of fluid milk for the marketing area and who represent not less than 65 percent of the total number of producers whose major interest in the fluid milk business is in the production of fluid milk for the marketing area, and who produce not less than 65 percent of the total volume of the

fluid milk produced for said marketing area by all such producers, desire that a stabilization and marketing plan for fluid milk be formulated for said area; but if a petition is presented to the director by the producers whose major interest in the fluid milk business is in the production of fluid milk for the marketing area, and who represent not less than 65 percent of the total number of producers whose major interest in the fluid milk business is in the production of fluid milk for the marketing area, and who produce not less than 65 percent of the total volume of the fluid milk produced for said marketing area by all such producers, it shall not be necessary that such hearing be held.

Article 6. Mandatory Provisions

4280. Each stabilization and marketing plan shall contain provisions for prohibiting distributors and retail stores from engaging in the unfair practices hereinafter set forth:

(a) The payment, allowance or acceptance of secret rebates, secret refunds, or unearned discounts by any person, whether in the form of money or otherwise.

(b) The giving of any milk, cream, dairy products, services or articles of any kind, except to bona fide charities, for the purpose of securing or retaining the fluid milk or fluid cream or fluid skim milk business of any customer.

(c) The extension to certain customers of special prices or services not made available to all customers who purchase fluid milk or fluid cream or fluid skim milk of like quantity under like terms and conditions.

(d) The false or misleading advertising of fluid milk or fluid cream or fluid skim milk as defined in

Sections 17500, 17501, and 17502 of the Business and Professions Code.

(e) The purchase of any fluid milk in excess of 200 gallons monthly from any producer or association of producers unless a written contract has been entered into with such producer or association of producers. Such contract shall include the following: (1) the amount of fluid milk to be purchased for any period; (2) the quantity of such milk to be paid for as Class 1. Such quantity shall be stated in pounds of milk or pounds of milk fat or gallons of milk; provided, that if the price to be paid for such Class 1 milk is established separately for the milk fat and skim milk contained in such milk, such quantity to be paid for as Class 1 shall be stated in pounds of milk or pounds of milk fat or gallons of milk or both in pounds of milk fat and pounds of skim milk separately, but in any marketing area where an equalization pool is a part of a stabilization and marketing plan, such contract need not specify the quantity of milk in any one class; (3) the price to be paid for all milk received; (4) the date and method of payment for such fluid milk, which shall be that payment shall be made for approximately one-half of the milk delivered in any calendar month not later than the first day of the next following month and the remainder not later than the fifteenth day of said month; (5) the charges for transportation if hauled by the distributor; and (6) a proviso to the effect that the producer shall not be obligated to deliver in any calendar month fluid milk to be paid for at or less than the minimum price for fluid milk that is used for Class 3, as said class is defined in Section 4228. The contract may contain such other provisions as are not in conflict with this chapter. A signed copy of such contract shall be filed by

the distributor with the director within five days from the date of its execution. The provisions of this subdivision relating to dates of payment shall not apply to contracts for the purchase of fluid milk from nonprofit cooperative associations of producers. The provisions of this subdivision do not apply to the purchase of fluid milk which is necessary to meet an unanticipated increase in demand or an unanticipated shortage in the supply of a distributor; provided, that the quantity of fluid milk so purchased from any one producer or association of producers shall not exceed 1,000 gallons in any one month; and, provided further, that a complete record of all such purchases shall be kept by the distributor and the price paid for such milk by the distributor shall not be less than the price established in the applicable stabilization and marketing plan for the usage to which such milk is applied.

(f) The purchasing, processing, bottling, transporting, delivering or otherwise handling in any marketing area of any fluid milk or fluid cream or fluid skim milk which is to be or is sold or otherwise disposed of by such distributor at any place in the geographical area within the outer, outside and external boundaries or limits of such marketing area, whether such place is a part of the marketing area or not, at less than the minimum wholesale and minimum retail prices effective in such marketing area.

(g) The payment by a distributor to any producer, including any association of producers, or the receipt by a producer, including any association of producers, from a distributor, of a lesser price for any fluid milk or fluid cream or fluid skim milk which is distributed to any person, including agencies of the federal, state or local government, located upon property within the geographical limits of any marketing area for

less than the minimum prices established by the director to be paid by distributors to producers for fluid milk, or the milk fat and skim milk contained therein, or fluid cream or fluid skim milk for said marketing area. The provisions of this section with respect to fluid milk shall apply whether or not such fluid milk is received by the distributor as whole milk, or as skim milk and fluid cream, or either, or as any other derivatives of such fluid milk which are reconstituted into such fluid milk, or fluid cream or fluid skim milk for market usage, and whether or not a fluid cream plan has been established for the marketing area.

4280.1. Each such plan shall contain provisions for prohibiting producers and distributors from engaging in the unfair practices hereinafter set forth:

(a) The payment or gift or the offer or promise of any payment or gift of money or other thing of value, directly or indirectly or through any agent or other intermediary, to any person with the purpose or design of inducing such person to become a wholesale customer of any distributor.

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4283. Each such plan shall contain provisions whereby the director shall provide methods for the establishment of minimum prices for fluid milk, fluid cream, or the milk fat or fluid skim milk components of such fluid milk or fluid skim milk, received within a marketing area regardless of whether such fluid milk, fluid cream, or the milk fat or fluid skim milk components of such fluid milk or fluid skim milk, is subsequently sold or distributed within or without such marketing area within the jurisdiction of the State of California, and may contain such provisions whether or not such fluid milk, fluid cream, or the milk

fat or fluid skim milk components of such fluid milk or fluid skim milk is subsequently sold or distributed without the jurisdiction of the State of California. Such stabilization and marketing plans shall provide for the establishment of prices for fluid milk, fluid cream, or the milk fat or fluid skim milk components of such fluid milk or fluid skim milk, whether or not such fluid milk, fluid cream, or the milk fat or fluid skim milk components of such fluid milk or fluid skim milk, is subsequently sold or distributed in another marketing area within the State of California where a stabilization and marketing plan is in effect. The stabilization and marketing plan shall provide that producers shall be paid not less than the minimum prices established for the marketing area wherein such fluid milk, fluid cream, or the milk fat or fluid skim milk components of such fluid milk or fluid skim milk, is ultimately sold or distributed, and shall further provide that in the event such fluid milk, fluid cream, of the milk fat or fluid skim milk components of such fluid milk, fluid skim milk, is subsequently sold or distributed in any place within the jurisdiction of the State of California where no stabilization and marketing plan is in effect, then such fluid milk, fluid cream, or the milk fat or fluid skim milk components of such fluid milk or fluid skim milk, shall be paid by the distributor to the producer thereof at not less than the average of prices paid by distributors, whose plants are located within such area, to producers for fluid milk, fluid cream, or the milk fat or fluid skim milk components of such fluid milk, but in the event no plants are located within said area, then the price which shall be paid by the distributor to the producer thereof shall not be less than the average of prices paid by distributors to producers for fluid milk, fluid

cream, or fluid skim milk, or the milk fat or fluid skim milk components of such fluid milk, at the plants in the nearest marketing areas adjacent to the area where such fluid milk, fluid cream, or the milk fat or fluid skim milk components of such fluid milk or fluid skim milk, is sold or distributed as established by the Stabilization and marketing plans in effect in such adjacent marketing areas.

Article 10. Minimum Wholesale and Retail Prices

4350. Pursuant to the declaration and statements of facts, policy and purposes set forth in this chapter, the director is hereby vested with the additional administrative duty and authority to prescribe and enforce minimum wholesale and minimum retail prices for fluid milk, or fluid cream, or both, as hereinafter set forth, and to enforce the provisions of this article.

4351. In all marketing areas wherein a stabilization and marketing plan for fluid milk is in effect or is hereafter established under the provisions of this chapter, the director shall designate and prescribe, or provide methods for designating and prescribing, minimum wholesale and minimum retail prices for fluid milk, including pasteurized concentrated milk, and low fat milk pursuant to the provisions of this article. In all marketing areas wherein the director has, under a stabilization and marketing plan for fluid milk, prescribed minimum prices to be paid by the distributors for fluid cream, or fluid skim milk, or either or both, the director may designate and prescribe, or provide methods for designating and prescribing minimum wholesale and minimum retail prices for fluid cream, or fluid skim milk, or either or both, pursuant to the provisions of this article. The term "fluid milk" as used in this chapter shall, unless

the context otherwise requires or indicates, mean and include (1) the term "fluid skim milk" in the application of this chapter to any marketing area in which the director has exercised his discretion to designate and prescribe, or provide methods for designating the prescribing, minimum wholesale and minimum retail prices for fluid skim milk, and (2) the term "low fat milk."

4352. Minimum wholesale prices, as used herein, shall mean prices at which fluid milk or fluid cream, or both, shall be sold by distributors to retail stores including the prices at which fluid milk or fluid cream shall be sold by distributors to retail stores, restaurants, confectioneries and other places for consumption on the premises but excluding, however, the prices at which fluid milk or fluid cream, or both, shall be sold by distributors to retail stores owned or operated by such distributor. Minimum wholesale prices, as used herein, includes prices at which fluid milk or fluid cream, or both, shall be sold by distributors to other distributors, other than in bulk, which prices may vary from the minimum prices established for sales by distributors to other wholesale customers and which prices shall be known as "subdistributor prices." A subdistributor price shall be established for each marketing area and when fluid milk or fluid cream, or both, is purchased, other than in bulk, by one distributor from another distributor for sale in a marketing area other than the marketing area where purchased the price paid shall not be less than the minimum subdistributor price for the marketing area in which the fluid milk or fluid cream, or both, is ultimately sold.

4353. Minimum retail prices, as used herein, shall mean minimum prices at which fluid milk or fluid

cream, or both, shall be sold by distributors and retail stores to consumers.

4355. In determining minimum wholesale and minimum retail prices for fluid milk or fluid cream, or both, for any marketing area, the director shall take into consideration the following economic factors operative in such marketing area in addition to other matters required by this chapter to be taken into consideration by him:

(a) The quantities of fluid milk or fluid cream, or both, distributed in such marketing area.

(b) The quantities of fluid milk or fluid cream, or both, normally required by consumers in such marketing area.

(c) The estimated purchasing power of consumers in such marketing area.

(d) The cost of fluid milk or fluid cream, or both, in such marketing area to distributors and retail stores, which in all cases shall be, respectively, the prices paid by distributors to producers and the minimum wholesale prices, as established pursuant to this chapter.

(e) The reasonably necessary cost of handling fluid milk or fluid cream, or both, incurred by distributors, including all costs of hauling, processing, selling and delivering and reasonable return on necessary capital investment, for each of the several methods of distribution used in such marketing area in accomplishing such hauling, processing, selling and delivery, excluding costs which are not reasonably necessary to efficient operation, as such costs are determined by impartial cost surveys, or examination of the books and records, or both, of all, or such portion of the distributors in such marketing area as are reasonably

determined by the director to be sufficiently representative to indicate the reasonably necessary costs of sufficient, efficient distribution for such marketing area.

(f) The estimated amount of the available capacity for processing and distributing fluid milk or fluid cream, or both, of distributors in such marketing area and the estimated extent to which such available capacity is being used by such distributors.

(g) The reasonably necessary cost of handling fluid milk or fluid cream, or both, incurred by retail stores, as such costs are determined by impartial cost surveys, or examination of the books and records, or both, of such portion of the retail stores in such marketing areas as are reasonably determined by the director to be sufficiently representative to indicate such costs of all retail stores in such marketing area. In determining such costs incurred by retail stores handling commodities in addition to fluid milk or fluid cream, or both, the director shall determine the cost of doing business for each such representative retail store and for such purpose shall consider all costs and expenses of doing business including depreciation on inventory and equipment. In the absence of satisfactory evidence to the contrary, the cost of handling such fluid milk or fluid cream, or both, shall be presumed to be the same percentage as the cost of doing business of such retail store in conducting its entire business.

4355.5. In determining minimum wholesale and minimum retail prices for any marketing area, the prices paid by distributors to producers as established pursuant to this chapter shall also be considered as the cost of fluid milk, fluid skim milk, or fluid cream to any association of producers, or other cooperative

association, incorporated or unincorporated, engaged in the distributions of fluid milk, fluid skim milk, or fluid cream.

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4360. Following such hearings, investigation, surveys or examinations authorized above, the director shall establish minimum wholesale and minimum retail prices for such marketing area for distributors therein, and minimum retail prices for retail stores therein, which minimum wholesale and minimum retail prices shall be sufficient, but not more than reasonably sufficient, to cover costs, as such costs are described in Section 4355 of this code, according to method of distribution, and reasonable return upon necessary capital investment, and shown to the director by the facts available to the director from the hearings, investigation, surveys or examinations for such marketing area required in this chapter, and the director shall declare such prices effective in the same manner as that prescribed in this chapter for declaring producer prices effective; provided, however, that whenever the director shall determine from credible evidence that any prices established as hereinabove set forth will not or would not conform to and effectuate the legislative declarations, purposes and intent set forth in this chapter, then he shall instead establish minimum wholesale or minimum retail prices which are higher or lower than those sufficient to cover said costs and reasonable return on capital investment, upon the condition that he shall determine in his judgment and shall find in writing with respect to such higher or lower minimum prices:

(a) That such minimum prices will tend to maintain in the business of distributing fluid milk and fluid

cream, or both, such reasonably efficient retail stores and distributors of fluid milk and fluid cream, or both, in such marketing area as the director finds necessary to insure to consumers in such marketing area sufficient distribution facilities to supply the quantity of fluid milk or fluid cream, or both, required by such consumers without requiring such consumers to pay more for their supplies of such fluid milk, or fluid cream, or both, than is necessary to maintain adequate and efficient distribution facilities in such marketing area.

(b) That such minimum prices will not tend to induce or authorize the development of unfair trade practices, unfair competition, conditions of monopoly or combinations in restraint of trade, and that such minimum prices will tend to encourage the orderly and efficient marketing of fluid milk or fluid cream, or both.

4361. No distributor shall sell to any retail store, restaurant, confectionery or other place for consumption on or off the premises, or to any consumer, and no retail store, restaurant, confectionery or other place for consumption on or off the premises, shall purchase from any distributor or sell to any consumer, any fluid milk or fluid cream, or either of them, at less than the prices as established by the director under the provisions of this article. The use or attempted use of any method, device or transaction whereby any distributor sells or offers or agrees to sell to any retail store, restaurant, confectionery or other place for consumption on or off the premises, or to any consumer, or any retail store, restaurant, confectionery, or other place for consumption on or off the premises, buys or offers or agrees to buy from

any distributor, or sells or offers or agrees to sell to any consumer, fluid milk or fluid cream, or either, at a price less than that established by the director under the provisions of this article, is prohibited whether such method, device or transaction applies directly to fluid milk, fluid cream or either or applies to or is used in connection with the sale or handling of any commodity, product or article. Prohibited methods, devices or transactions shall include, but not be limited to, any one or more of the following: discounts, rebates, free services, advertising allowances, leases of refrigeration or other equipment, gifts, or payments, allowances or credits made or given for, or in connection with, the return of containers or other property, unless such payment, allowance or credit is a repayment of a deposit or charge, in excess of the price established by the director under the provisions of this article, paid by a wholesale customer, or by a consumer, for the return of such containers or other property.

A distributor, or retail store, restaurant, confectionery or other place for consumption on or off the premises shall be considered to have violated the provisions of this section if it engages in such violation directly or through an agent, employee, or subsidiary or affiliated company or corporation. For purposes of this section subsidiary or affiliated company or corporation includes, but is not limited to, companies or corporations controlled by the distributor, or retail store, restaurant, confectionery or other place for consumption on or off the premises, directly or indirectly through ownership of issued capital stock or otherwise.

* * * * * *

Article 11. Distributors' Licenses, Fees and Bonds

4375. No distributor shall deal in fluid milk or fluid cream without first having obtained a license from the director. The special licenses provided in this section are in addition to any and all licenses required by any section of Division 4, Agricultural Code, or any law or ordinance of any county or municipality of this State. Applications for the licenses herein provided shall be made on forms prescribed by the director, shall be accompanied by an application fee of three dollars ($3), and shall state the name and address of the applicant and such details as to the nature of the applicant's business as the director may require. Such applicant shall further satisfy the director of his or its character, responsibility and good faith in seeking to carry on the business stated in the application. Licenses shall be issued for a period of twelve (12) months from the first day of each year or for the remainder of the calendar year from the date of issuance. Application for renewal of a license for the following year by a licensee, together with the application fee of three dollars ($3), shall be made prior to the expiration date of the license held, and if not so made the applicant shall pay an additional sum equal to 100 percent of the application fee before such license shall be issued.

Article 14. Penalties

4410. (a) The violation of any provision of this chapter, or of any provision of any stabilization and marketing plan or any order of the director establishing minimum wholesale and minimum retail prices for fluid milk or fluid cream formulated under the provi-

sions of this chapter, or of any of the unfair practices set forth in this chapter, or of any rule or regulation duly adopted and promulgated by the director under Section 4361.5, is a misdemeanor, and is furthermore ground for revocation or suspension of license in the manner set forth in this chapter. The unfair practice provisions described in this chapter are hereby declared to apply to all distributors, whether or not a plan is in effect in the area in which a distributor is licensed or carries on business.

(b) Every distributor must pay for fluid milk or fluid cream delivered to him or it at the time and in the manner specified in the contract with the producer; failure to make such payment is hereby declared to be a violation of this chapter, and ground for refusal, suspension or revocation of license in the manner set forth in this chapter.

(c) Any person who violates any provision of this chapter or of a stabilization and marketing plan or any order of the director establishing minimum wholesale and minimum retail prices for fluid milk or fluid cream or any rule or regulation duly adopted and promulgated by the director under Section 4240 shall be liable civilly in the sum of five hundred dollars ($500) for each and every violation, such sum to be recovered by the director in any court of competent jurisdiction. All sums recovered under this section shall be deposited in the State Treasury to the credit of the Department of Agriculture Fund.

Article 15. Disciplinary Proceedings.

4415. The director may refuse to grant any license herein provided and may revoke or suspend any such license as the case may require when he is satisfied

that any applicant or licensee has violated any provision of this chapter, or any provision of any stabilization and marketing plan formulated under the provisions of this chapter, or of any order of the director establishing minimum wholesale and minimum retail prices for fluid milk or fluid cream formulated under the provisions of this chapter, or any rule or regulation duly adopted and promulgated by the director under Section 4240. The proceedings shall be conducted in accordance with Chapter 5 of Part 1 of Division 3 of Title 2 of the Government Code, and the director shall have all the powers granted therein. The decision may include an order refusing, revoking or suspending the license applied for, or held by the respondent, or affixing such other conditional and probationary orders as may be proper for the enforcement of this chapter or any provision of any stabilization and marketing plan formulated under the provisions of this chapter, or of any order of the director establishing minimum wholesale and minimum retail prices for fluid milk or fluid cream formulated under the provisions of this chapter, or of any rule or regulation duly adopted and promulgated by the director under Section 4240.

After any decision including any conditional or probationary orders, should respondent fail, refuse or neglect to comply with any such orders, the director may suspend or revoke the license in accordance with the procedure provided in this section.

Previous violation by any applicant, or by any person connected with said applicant, of any provision of this chapter, or of any provision of any stabilization and marketing plan formulated under the provisions of this chapter, or of any order of the director

establishing minimum wholesale and minimum retail prices for fluid milk or fluid cream, formulated under the provisions of this chapter, or any rule or regulation, duly adopted and promulgated by the director under Section 1240, shall be good and sufficient ground for denial, revocation or suspension of a license.

1116. Whenever the director is satisfied, either by investigation or after hearing, that a distributor is 'unable to pay' for fluid milk and or fluid cream purchased from producers, and is further satisfied that to permit the distributor to continue to purchase and receive fluid milk and or fluid cream from producers would be likely to cause serious and irreparable loss to producer-creditors and other producers, then the director within his discretion may thereupon and forthwith shorten the time for hearing that is provided for in Chapter 5 of Part 1 of Division 3 of Title 2 of the Government Code, and thereupon may issue an order to show cause why the license of said distributor should not be forthwith suspended or revoked: provided, however, that the time of notice of said hearing shall in no event be less than five days. At such hearing the distributor proceeded against shall be ordered to show cause why his or its license should not be suspended or revoked or continued under such conditions and provisions, if any, as the director may consider just and proper and for the protection of the best interests of the producer-creditors and producers from whom the distributor has been and is receiving fluid milk and or fluid cream. Following such hearing, the decision of the director shall become effective at his discretion.

Said hearing, in the case of such emergency, may be called upon written notice, said notice to be served

personally or by mail on the distributor involved and may be held at the nearest office of the director or at such place as may be most convenient in the discretion of the director for the attendance of all parties involved.

Article 16. Construction and Interpretation

4420. (a) The Legislature hereby declares that Chapter 17 of Division 6 of this code is intended to formulate a comprehensive scheme for the regulation of marketing and distribution of fluid milk and fluid cream. If, however, any provision of, or addition or amendment to, said Chapter 17 of Division 6 of this code, either as originally enacted in 1935 at the Fifty-first Regular Session of the California Legislature, or as amended or added to or recodified or reenacted at any subsequent session of the California Legislature, should be held to be unconstitutional, the unconstitutionality of such provision shall not affect any other provision of said chapter.

(b) If any article, section, subsection, sentence, clause or phrase of any provision of Chapter 17 of Division 6 of this code is for any reason held to be unconstitutional, such decision shall not affect the validity of the remaining provisions of said chapter. The Legislature hereby declares that it would have enacted each article, section, subsection, sentence, clause or phrase of said chapter irrespective of the fact that one or more other articles, sections, subsections, sentences, clauses or phrases be declared unconstitutional."

B. The California statutes granting state consent to the federal purchase of land for military purposes are:

Section 34, Political Code, enacted 1872:

"The legislature consents to the purchase or condemnation by the United States of any tract of land within this State for the purpose of erecting forts, magazines, arsenals, dockyards, and other needful buildings, upon the express condition that all civil process issued from the Courts of this State, and such criminal process as may issue under the authority of this State, against any person charged with crime, may be served and executed thereon in the same mode and manner and by the same officers as if the purchase or condemnation had not been made."

Section 34, Political Code, as amended by Statutes of 1939, Chapter 710, page 2231:

"The Legislature consents to the purchase or condemnation by the United States of any tract of land within this State for the purpose of erecting forts, magazines, arsenals, dockyards, and other needful buildings, upon the express condition that all civil process issued from the courts of this State, and such criminal process as may issue under the authority of this State, against any person charged with crime, may be served and executed thereon in the same mode and manner and by the same officers as if the purchase or condemnation had not been made and upon the further express condition that the State reserves its entire power of taxation with respect to such tracts of land and may levy and collect all taxes now or hereafter imposed in the same manner and to the same extent as if this consent had not been granted.

The authority to serve civil and criminal process and power to tax hereinabove reserved to the State in

the case of the purchase or condemnation by the United States of any tract of land within this State shall, any law to the contrary notwithstanding, also be reserved to the State with respect to any tract or land over which any jurisdiction is ceded or granted by the State to the United States under any law of this State now in effect or which may hereafter be adopted, the authority and power herein reserved by the State to be exercised in the same manner and to the same extent as if such jurisdiction had not been ceded or granted by the State to the United States."

Government Code, Section 111, Statutes 1943, Chapter 134, page 898:

"The Legislature consents to the purchase or condemnation by the United States of any tract of land within the State for the purpose of erecting forts, magazines, arsenals, dockyards, and other needful buildings, reserving the authority to serve and execute process and the State's entire power of taxation as provided in this article."

Government Code, Section 126; Statutes First Extra Session 1946, Chapter 154, page 199:

"Notwithstanding any other provision of law, general or special, the Legislature of California consents to the acquisition by the United States of land within this State upon and subject to each and all of the following express conditions and reservations, in addition to any other conditions or reservations prescribed by law:

(a) The acquisition must be for the erection of forts, magazines, arsenals, dockyards, and other needful buildings, or other public purpose within the pur-

view of Clause 17 of Section 8 of Article I of the Constitution of the United States;

(b) The acquisition must be pursuant to and in compliance with the laws of the United States;

(c) The United States must have acquired title to the land and must in writing have assented to acceptance of jurisdiction over the land upon and subject to each and all of the conditions and reservations in this section prescribed;

(d) The conditions prescribed in subdivisions (a), (b), and (c) of this section must have been found and declared to have occurred and to exist, by the State Board of Equalization, and the board must have found and declared that such acquisition is in the interest of the State, certified copies of its orders or resolutions making such findings and declarations to be filed in the office of the Secretary of State and recorded in the office of the county recorder of each county in which any part of the land is situate;

(e) In granting this consent, the Legislature and the State reserve jurisdiction on and over the land for the execution of civil process and criminal process in all cases, and the State's entire power of taxation including that of each State agency, county, city, city and county, political subdivision or public district of or in the State; and reserves to all persons residing on such land, all civil and poltical rights, including the right of suffrage, which they might have were this consent not given.

(f) This consent continues only so long as the land continues to belong to the United States and is held by it in accordance and in compliance with each and all of the conditions and reservations in this section prescribed.

The finding and declaration of the State Board of Equalization provided for in subdivision (d) of this section shall be made only after a public hearing. Notice of such hearing shall be published once in a newspaper of general circulation in each county in which the land or any part thereof is situated and a copy of such notice shall be personally served upon the clerk of the board of supervisors of each such county. The State Board of Equalization shall make rules and regulations governing the conditions and procedure of such hearings, which shall provide that the cost of publication and service of notice shall be borne by the owner or transferee of the property.

The provisions of this section do not apply to any land or water areas heretofore or hereafter acquired by the United States for migratory bird reservations in accordance with the provisions of Sections 377 to 380, inclusive, of the Fish and Game Code."

Government Code, Section 126 Statutes 1961, Chapter 966, page 2606:

"Notwithstanding any other provision of law, general or special, the Legislature of California consents to the acquisition by the United States of land within this State upon and subject to each and all of the following express conditions and reservations, in addition to any other conditions or reservations prescribed by law:

(a) The acquisition must be for the erection of forts, magazines, arsenals, dockyards, and other needful buildings, or other public purpose within the purview of clause 17 of Section 8 of Article I of the Constitution of the United States, or for the establishment, consolidation and extension of national forests under the provisions of the act of Congress approved

March 1, 1911, (36 Stat. 961) known as the "Weeks Act";

(b) The acquisition must be pursuant to and in compliance with the laws of the United States;

(c) The United States must in writing have requested state consent to acquire such land and subject to each and all of the conditions and reservations in this section and in Section 4 of Article XIV of the Constitution prescribed;

(d) The conditions and reservations prescribed in subdivisions (a), (b), (c), (e), and (h) of this section must have been found and declared to have occurred and to exist, by the State Lands Commission, and the commission must have found and declared that such acquisition is in the interest of the State, certified copies of its orders or resolutions making such findings and declarations to be filed in the Office of the Secretary of State and recorded in the office of the county recorder of each county in which any part of the land is situate;

(e) In granting this consent, the Legislature and the State grant concurrent jurisdiction on and over the land to the United States, excepting and reserving state jurisdiction on and over the land for the execution of civil and criminal process and to enforce the laws of the State of California in all cases, and the State's entire power of taxation including that of each state agency, county, city, city and county, political subdivision or public district of or in the State; and reserve to all persons residing on such land all civil and political rights, including the right of suffrage, which they might have were this consent not given.

(f) This consent continues only so long as the land continues to belong to the United States and is held by it in accordance and in compliance with each and all of the conditions and reservations in this section prescribed.

(g) Acquisition as used in this section means: (1) lands acquired in fee by purchase or condemnation, (2) lands owned by the United States that are included in the military reservation by presidential proclamation or act of Congress, and (3) leaseholds acquired by the United States over private lands or state-owned lands."

(h) In granting this consent, the Legislature and the State reserve jurisdiction over the land, water and use of water with full power to control and regulate the acquisition, use, control and distribution of water with respect to the land acquired.

(i) In granting this consent, the Legislature and the State except and reserve to the State all deposits of minerals, including oil and gas, in the land, and to the State, or persons authorized by the State, the right to prospect for, mine, and remove such deposits from the land.

The finding and declaration of the State Lands Commission provided for in subdivision (d) of this section shall be made only after a public hearing. Notice of such hearing shall be published pursuant to Section 6061 in each county in which the land or any part thereof is situated and a copy of such notice shall be personally served upon the clerk of the board of supervisors of each such county. The State Lands Commission shall make rules and regulations governing the conditions and procedure of such hearings, which shall provide that the cost of publication and service of notice and all other expenses incurred by the commission shall be borne by the United States.

The provisions of this section do not apply to any land or water areas heretofore or hereafter acquired by the United States for migratory bird reservations in accordance with the provisions of Sections 10680 to 10685, inclusive, of the Fish and Game Code.

SEC. 2. This act is an urgency measure necessary for the immediate preservation of the public peace, health or safety within the meaning of Article IV of the Constitution and shall go into immediate effect. The facts constituting such necessity are:

The extent to which jurisdiction of the State of California applies within federal lands in this State is a matter of the utmost importance in numerous transactions every day. It is imperative that this bill, which, in effect, requires that the will of the people of this State prevail in all territory within the boundaries of this State, to the extent not inconsistent with federal duties, go into effect as early as possible. Thereby, those laws which the people, through their representatives, have enacted for the public peace, health, and safety will have greater applicability."

C. The California statutes tendering cession of jurisdiction to the United States over land conveyed or ceded to the government for military purposes are:

Statutes of 1897, Chapter 56, page 51:

"SECTION 1. The State of California hereby cedes to the United States of America exclusive jurisdiction over all lands within this State now held, occupied, or reserved by the Government of the United States for military purposes or defense, or which may hereafter be ceded or conveyed to said United States for such purposes; *provided*, that a sufficient description by metes and bounds and a map or plat of such lands be filed in the proper office of record in the county in

which the same are situated; *and provided further*, that this State reserves the right to serve and execute on said lands all civil process, not incompatible with this cession, and such criminal process as may lawfully issue under the authority of this State against any person or persons charged with crimes committed without said lands.

SEC. 2. This Act shall take effect immediately."

Government Code, Section 114, Statutes of 1943, Chapter 134, page 898:

"The State cedes to the United States exclusive jurisdiction over all lands within the State held, occupied, or reserved on March 2, 1897 by the United States for military purposes or defense, and over all land which thereafter has been or which may be ceded or conveyed to the United States for such purposes, reserving the authority to serve and execute process, and the State's entire power of taxation. A sufficient description by metes and bounds and a map or plat of the lands shall first be filed in the proper office of record in the county in which the lands are situated."

D. The California statutes reserving state criminal jurisdiction over officers committed on lands whose jurisdiction is ceded to the United States are:

Statutes of 1891, Chapter 181, page 262:

"SECTION 1. The State of California hereby cedes to the United States of America exclusive jurisdiction over such piece or parcel of land as may have been or may be hereafter ceded or conveyed to the United States, during the time the United States shall be or remain the owner thereof, for all purposes except the administration of the criminal laws of this State and the service of civil process therein.

SEC. 2. This Act shall take effect immediately."

Government Code, Section 113, Statutes 1943, Chapter 134, page 898:

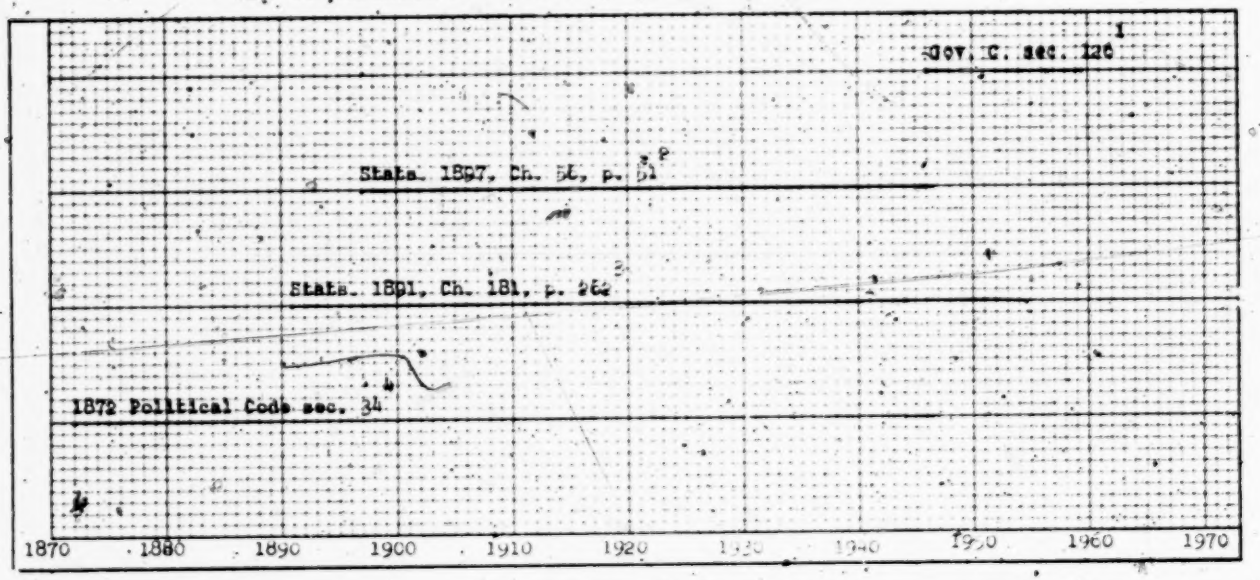
"The State cedes to the United States exclusive jurisdiction over such land as has been or may be ceded or conveyed to the United States, during the time the United States is the owner thereof, reserving the administration of the criminal law of the State, the authority to serve and execute process and the State's entire power of taxation."

Government Code; Section 113, as amended Statutes of 1947, Chapter 1532, page 3164:

"SEC. 2. Section 113 of said code is amended to read:

113. The State reserves the administration of the criminal law of the State with respect to any land over which any jurisdiction has been or may be ceded or conveyed to the United States, during the time the United States is the owner thereof."

E. Graph showing legislative history of the California consent to purchase and cession of jurisdiction statutes.



FOOTNOTES

[1] Gov. C. sec. 126, eff. May 21, 1946 by Stats. 1st Ex. Sess., 1946, Ch. 154, p. 190. Now in effect as amended eff. July 6, 1961 by Stats. 1961, Ch. 966, p. 2986.

[2] Stats. 1897, Ch. 56, p. 51, eff. March 2, 1897, codified into Gov. C. sec. 114, eff. Aug. 4, 1943, by Stats. 1943, Ch. 134, p. 898, until repealed eff. Sept. 19, 1947 by Stats. 1947, Ch. 1532, p. 3163.

[3] Stats. 1891, Ch. 181, p. 262, eff. March 31, 1891, codified into Gov. C. sec. 113 eff. Aug. 4, 1943, by Stats. 1943, Ch. 134, p. 898, until repealed eff. Sept. 7, 1955 by Stats. 1955, Ch. 1447, p. 2636.

[4] 1872 Pol. C. sec. 34, eff. March 12, 1872, codified into Gov. C. sec. 111, eff. Aug. 4, 1943, by Stats. 1943, Ch. 134, p. 1009, until repealed eff. Sept. 19, 1947 by Stats. 1947, Ch. 1532, p. 3163.

F. California Senate Bills 656, enacted as Government Code, Sections 113 and 126, Statutes of 1947, Chapter 1532, page 3163, as introduced January 29, 1947, and as amended in the State Senate May 16, 1947, read:

SENATE BILL No. 656

January 29, 1947

An act to amend Section 126 of the Government Code, relating to the acquisition of land in this State by the United States.

The people of the State of California do enact as follows:

SECTION 1. Section 126 of the Government Code is amended to read:

126. Notwithstanding any other provision of law, general or special, the Legislature of California consents to the acquisition by the United States of land within this State upon and subject to each and all of the following express conditions and reservations, in addition to any other conditions or reservations prescribed by law:

(a) The acquisition must be for the erection of forts, magazines, arsenals, dockyards, and other needful buildings, or other public purpose within the purview of Clause 17 of Section 8 of Article I of the Constitution of the United States;

(b) The acquisition must be pursuant to and in compliance with the laws of the United States;

(c) The United States must have acquired title to the land and must in writing have assented to acceptance of jurisdiction over the land upon and subject to each and all of the conditions and reservations in this section prescribed;

(d) The conditions prescribed in subdivisions (a), (b), and (c) of this section must have been found and declared to have occurred and to exist, by the State ~~Board of Equalization~~ *Lands Commission*, and the ~~board~~ *commission* must have found and declared that such acquisition is in the interest of the State, certified copies of its orders or resolutions making such findings and declarations to be filed in the office of the Secretary of State and recorded in the office of the county recorder of each county in which any part of the land is situate;

(e) In granting this consent, the Legislature and the State reserve jurisdiction on and over the land for the execution of civil process and criminal process in all cases, and the State's entire power of taxation including that of each state agency, county, city, city and county, political subdivision or public district of or in the State; and reserves to all persons residing on such land all civil and political rights, including the right of suffrage, which they might have were this consent not given.

(f) This consent continues only so long as the land continues to belong to the United States and is held by it in accordance and in compliance with each and all of the conditions and reservations in this section prescribed.

The finding and declaration of the State ~~Board of Equalization~~ *Lands Commission* provided for in subdivision (d) of this section shall be made only after a public hearing. Notice of such hearing shall be published once in a newspaper of general circulation in each county in which the land or any part thereof is situated and a copy of such notice shall be personally served upon the clerk of the board of supervisors of each such county. The State ~~Board of Equalization~~

Lands Commission shall make rules and regulations governing the conditions and procedure of such hearings, which shall provide that the cost of publication and service of notice shall be borne by the owner or transferee of the property.

The provisions of this section do not apply to any land or water areas heretofore or hereafter acquired by the United States for migratory bird reservations in accordance with the provisions of Sections 375 to 380, inclusive, of the Fish and Game Code.

AMENDED IN SENATE MAY 16, 1947

SENATE BILL No. 656

~~*An act to amend Section 126 of the Government Code, relating*~~ AN ACT TO AMEND SECTIONS 126 AND 113, AND TO REPEAL SECTIONS 111, 112, 114, 116 AND 117 OF THE GOVERNMENT CODE, AND TO REPEAL CHAPTER 3, STATUTES 1934 (1ST EX.) SESSION, RELATING *to the acquisition of land in this State by the United States.*

The people of the State of California do enact as follows:

SECTION 1. Section 126 of the Government Code is amended to read:

126. Notwithstanding any other provision of law, general or special, the Legislature of California consents to the acquisition by the United States of land within this State upon and subject to each and all of the following express conditions and reservations, in addition to any other conditions or reservations prescribed by law:

(a) The acquisition must be for the erection of forts, magazines, arsenals, dockyards, and other needful buildings, or other public purpose within the purview of Clause 17 of Section 8 of Article I of the Constitution of the United States, *or for the establishment, consolidation and extension of national forests under the provisions of the act of Congress approved March 1, 1911, (36 Stat. 961) known as the "Weeks Act";*

(b) The acquisition must be pursuant to and in compliance with the laws of the United States;

(c) The United States ~~must have acquired title to the land and~~ must in writing have assented to acceptance of jurisdiction over the land upon and subject to each and all of the conditions and reservations in this section prescribed;

(d) The conditions prescribed in subdivisions (a), (b), and (c) of this section must have been found and declared to have occurred and to exist, by the State Lands Commission, and the commission must have found and declared that such acquisition is in the interest of the State, certified copies of its orders or resolutions making such findings and declarations to be filed in the office of the Secretary of State and recorded in the office of the county recorder of each county in which any part of the land is situate;

(e) In granting this consent, the Legislature and the State reserve jurisdiction on and over the land for the execution of civil process and criminal process in all cases, and the State's entire power of taxation including that of each state agency, county, city, city and county, political subdivision or public district of or in the State; and ~~reserves~~ *reserve* to all persons residing on such land all civil and political rights, including the right of suffrage, which they might have were this consent not given.

(f) This consent continues only so long as the land continues to belong to the United States and is held by it in accordance and in compliance with each and all of the conditions and reservations in this section prescribed.

The finding and declaration of the State Lands Commission provided for in subdivision (d) of this section shall be made only after a public hearing. Notice of such hearing shall be published once in a newspaper of general circulation in each county in which the land

or any part thereof is situated and a copy of such notice shall be personally served upon the clerk of the board of supervisors of each such county. The State Lands Commission shall make rules and regulations governing the conditions and procedure of such hearings, which shall provide that the cost of publication and service of notice shall be borne by the owner or transferee of the property.

The provisions of this section do not apply to any land or water areas heretofore or hereafter acquired by the United States for migratory bird reservations in accordance with the provisions of Sections 375 to 380, inclusive, of the Fish and Game Code.

SEC. 2. Section 113 of said code is amended to read:

113. The State ~~cedes to the United States exclusive jurisdiction over such land as has been or may be ceded or conveyed to the United States, during the time the United States is the owner thereof, reserving~~ *reserves* the administration of the criminal law of the State ~~, the authority to serve and execute process and the State's entire power of taxation~~ *with respect to any land over which any jurisdiction has been or may be ceded or conveyed to the United States, during the time the United States is the owner thereof.*

SEC. 3. Sections 111, 112, 114, 116, and 117 of said code are repealed.

SEC. 4. Chapter 3 of the Statutes of 1934 (First Extraordinary) Session is repealed.

IV. PUBLICATIONS AND LETTERS, UNITED STATES DEPARTMENTS OF AGRICULTURE, AND DEFENSE.

United States Department of Agriculture bulletin 2179-61, dated July 12, 1961:

UNITED STATES DEPARTMENT OF AGRICULTURE

Washington, July 12, 1961

Program Increases 1960 Military and Veterans Milk Use by 543 Million Pints:

The U.S. Department of Agriculture today announced that U.S. Armed Forces and veterans hospital patients increased consumption of milk over the standard ration by about 543 million pints in 1960 under a special USDA program to stimulate expanded use of milk for troop feeding.

Under this program USDA pays a part of the cost of additional milk consumed.

Total consumption of fluid-milk by personnel in the Army, Navy, Air Force, Marines, Coast Guard, U.S. Merchant Marine Academy, and veterans hospitals was more than double what it would have been if only standard ration purchases of fluid milk had been made.

Secretary of Agriculture Orville L. Freeman said, "This is a highly beneficial use of our agricultural abundance. It is made possible by the efficient production of American farmers and by programs which enable them to protect the public against scarcity.

"As a direct result of this program, men and women in the U.S. Armed Forces, the U.S. Merchant Marine and veterans hospitals are getting considerably larger rations of nutritious and healthful milk. Price-support purchases are reduced as more of our yearly milk production is consumed in fluid form to the benefit of the military personnel and the entire Nation."

Under an agreement between the Commodity Credit Corporation and the Army Quartermaster Corps, acting for all military agencies, the Coast Guard, and the U.S. Merchant Marine Academy, and another agreement between CCC and the Veteran's Administration, part of the cost of the increase is being paid from CCC funds.

The part paid by CCC through 1960 was $4.10 per hundred pounds of milk. The increase in milk consumption diverts fluid milk from the manufacture of dairy products that otherwise would be purchased by CCC under price support.

Payments to the cooperating agencies for the 1960 increase in consumption totaled $23,911,074. This is the approximate cost that CCC would have incurred in purchasing, handling, and storing butter and nonfat dry milk produced from an amount of milk equal to the increase of 583,197,726 pounds in consumption, or the equivalent of about 543 million pints of milk.

Milk consumption under this special program has been increased 2,858,135,883 pounds or about 2,659,000,000 pints since the beginning of the program in November 1954. Payments by CCC amount to $117,184,305. Additional details are given on the other side of this release concerning the milk consumption increases.

Also shown on the other side are the quantities of dairy products that have been transferred to these agencies during the period May 1953 through December 1960 to increase their consumption over and above normal consumption of these dairy products.

The programs are carried out under legislation authorizing purchases of fluid milk in carrying out mandatory price-support operations, and also provid-

ing that CCC stocks of dairy products may be transferred for increased use by Armed Forces and other agencies.

The following table shows the fluid milk consumption increases by personnel in the Armed Forces, veterans hospitals, Coast Guard and Merchant Marine Academy since 1954 when the special program began, through 1960.

Period	*Pounds*	*Dollars*
1954	17,380,701	712,608
1955	182,463,301	7,480,761
1956	344,149,844	14,110,121
1957	601,289,972	24,652,888
1958	565,616,012	23,191,255
1959:		
January-March	140,901,126	5,776,946
April-June	137,332,333	5,630,627
July-September	144,261,183	5,914,709
October-December	141,544,285	5,803,316
Total	564,038,927	23,125,598
1960:		
January-March	140,924,706	5,777,881
April-June	143,882,496	5,899,182
July-September	151,825,945	6,224,864
October-December	146,564,579 [1]	6,009,147 [1]
Total	583,197,726 [1]	23,911,074 [1]
November 1954 to December 1960	2,858,135,883	117,184,305

[1] Preliminary.

Shown below are the quantities of dairy products transferred to these agencies for use in addition to their normal consumption from May 1953 through 1960.

	Butter	Cheese. (Thousand pounds)	Nonfat dry milk
1953	15,034 [2]		
1954	26,949 [2]	502	63
1955	36,612	1,697	142
1956	25,241	1,752	122
1957	22,811	2,016	36
1958	24,974	2,435	38
1959	24,641	2,708	72
1960	15,947	496	76
1953-60 Total	192,209	11,606	549

[2] Includes 34,936,000 pounds sold at reduced prices in 1953 and 1954 for ... creased use.

Letters dated April 16, 1943 (R. 374) and January 3, 1944 (R. 339), from United States Secretary of War to Governor of California:

WAR DEPARTMENT

WASHINGTON, January 3, 1944

HONORABLE EARL WARREN
Governor of California
Sacramento, California

DEAR GOVERNOR WARREN:

The laws of the State of California (Section 33 of the Political Code of California, and section 34 of said code as amended by an act of the legislature of California approved July 5, 1939 (Cal. Stat., 1939, chap. 710, p. 2231), permit the assumption of exclusive Federal jurisdiction over lands within that State acquired by the United States for military and certain other purposes.

Under section 355, Revised Statutes, as amended by the act of February 1, 1940 (54 Stat. 19), and by the act of October 9, 1940 (54 Stat. 1083; 40 U.S.C. 255),

it is provided in effect that unless and until the United States has accepted jurisdiction over lands acquired or in which any interest shall have been acquired after February 1, 1940, it shall be conclusively presumed that no such jurisdiction has been accepted.

Accordingly, notice is hereby given that the United States accepts exclusive jurisdiction over all lands acquired by it for military purposes within the State of California, title to which has heretofore vested in the United States and over which exclusive jurisdiction has not heretofore been obtained.

Information is being assembled to assist you in complying with an act of the legislature of California approved May 17, 1943 (Cal. Stats. 1943, chap. 536), and will be forwarded under separate cover.

Return of the duplicate copy of this letter, with your indorsement thereon designating time of receipt of this acceptance by your office, would be appreciated.

Sincerely yours,

(signed) HENRY L. STIMSON
Secretary of War

Original of this letter received January 8, 1944

(signed) EARL WARREN
Governor of California

OSW 680.2
California
(4 16 43)

HONORABLE EARL WARREN
Governor of California
Sacramento, California

DEAR GOVERNOR WARREN:

The laws of the State of California, (Section 33 of the Political Code of California, and section 34 of said code as amended by an act of the legislature of California approved July 5, 1939 (Cal. Stat., 1939, chap. 710, p. 2231), permit the assumption of exclusive Federal jurisdiction over lands within that State, acquired by the United States for military and certain other purposes.

Under section 355, Revised Statutes, as amended by the act of February 1, 1940 (54 Stat. 19), and by the act of October 9, 1940 (54 Stat. 1083; 40 U.S.C. 255), it is provided in effect that unless and until the United States has accepted jurisdiction over lands acquired or in which any interest shall have been acquired after February 1, 1940, it shall be conclusively presumed that no such jurisdiction has been accepted.

Accordingly, notice is hereby given that the United States accepts exclusive jurisdiction over all lands acquired by it for military purposes within the State of California, title to which has heretofore vested in the United States and over which exclusive jurisdiction has not heretofore been obtained.

It is requested that you return the inclosed copy of this letter, with an indorsement thereon over your signature stating the date of your receipt of this notice.

Sincerely yours,

HENRY L. STIMSON
Secretary of War

The original of this letter of acceptance was received in the Office of the Governor on the 21st day of April, 1943.

EARL WARREN
Governor of the State of California

V. CONSENT TO PURCHASE AND CESSION OF JURISDICTION, STATUTES OF STATES OTHER THAN CALIFORNIA.

Section 3, Chapter 1, Article I. 1931 Code of West Virginia, provided:

"*Acquisition of Lands by United States; Jurisdiction.* The consent of this State is hereby given to the acquisition by the United States, or under its authority, by purchase, lease, condemnation, or otherwise, of any land acquired, or to be acquired in this State by the United States, from any individual, body politic or corporate, for sites for lighthouses, beacons, signal stations, post offices, customhouses, courthouses, arsenals, soldiers' homes, cemeteries, locks, dams, armor plate manufacturing plants, projectile factories or factories of any kind or character, or any needful buildings or structures or proving grounds, or works for the improvement of the navigation of any watercourse, or work of public improvement whatever, or for the conservation of the forests, or for any other purpose for which the same may be needed or required by the government of the United States. The evidence of title to such land shall be recorded as in other cases.

"Any county, magisterial district or municipality, whether incorporated under general law or special act of the legislature, shall have power to pay for any such tract or parcel of land and present the same to the government of the United States free of cost, for any of the purposes aforesaid, and to issue bonds and levy taxes for the purpose of paying for the same; and, in the case of a municipal corporation, the land so purchased and presented may be within the corporate limits of such municipality or within five miles thereof: Provided, however, That no such county, magisterial

district or municipality shall, by the issue and sale of such bonds, cause the aggregate of its debt to exceed the limit fixed by the Constitution of this State: Provided further, That the provisions of the Constitution and statutes of this State, or of the special act creating any municipality, relating to submitting the question of the issuing of bonds and all questions connected with the same to a vote of the people, shall, in all respects, be observed and complied with.

"Concurrent jurisdiction with this State in and over any land so acquired by the United States shall be, and the same is hereby, ceded to the United States for all purposes; but the jurisdiction so ceded shall continue no longer than the United States shall be the owner of such lands, and if the purposes of any grant to the United States shall cease, or the United States shall for five consecutive years fail to use any such land for the purposes of the grant, the jurisdiction hereby ceded over the same shall cease and determine, and the right and title thereto shall reinvest in this State. The jurisdiction ceded shall not vest until the United States shall acquire title of record to such land. Jurisdiction heretofore ceded to the United States over any land within this State by any previous acts of the legislature shall continue according to the terms of the respective cessions."

Section 4, Chapter XX, page 265, 1881 Acts of West Virginia, provided:

"4. In pursuance of the seventeenth clause of the eighth section of the first article of the constitution of the United States, the consent of the legislature of West Virginia is hereby given to the purchase or condemnation, whether heretofore or hereafter made or had by the government of the United States, or

under its authority, of any tract or parcel of land within the limits of the state, for the purpose of erecting thereon lighthouses, beacons, signal stations, post offices, custom houses, court houses, locks, dams, and works for the improvement of the navigation of any water course, and other needful buildings or structures. The evidences of title to such land shall be recorded as in other cases. But the quantity of land to be so acquired shall not exceed twenty-five acres in any one place."

1927 Acts of Arkansas, Act 108, page 302, provided:

SECTION 1. That Section 4566 of Crawford & Moses' Digest is hereby amended to read as follows:

"That the consent of the State of Arkansas be and is hereby given to the acquisition by the United States, by purchase, or otherwise with adequate compensation, of such land in Arkansas as in the opinion of the Federal Government may be needed for the establishment, consolidation and extension of National Forests in the State, for the purpose of the Act of Congress entitled "An Act to Enable any State to cooperate with any other State or States, or with the United States, for the protection of the Watersheds of Navigable Streams and to Appoint a Commission for the Acquisition of Lands for the Purpose of Conserving the Navigability of Navigable Rivers," approved March 1st, 1911, (36 Statute, 961), and acts supplementary thereto and amendatory thereof; provided, that this Section applies only in those counties where the United States now owns land comprising National Forests and in Counties adjoining the aforesaid Counties; further provided, that the State of Arkansas shall retain a concurrent jurisdiction with the United States in and over lands so acquired so far that civil

process in all cases, and such criminal process as may be issue under the authority of the State of Arkansas against any person charged with the commission of any crime, without or within said jurisdiction, may be executed thereon in like manner as if this Act had not been passed."

SECTION 2. That Section 4567 of Crawford & Moses' Digest is hereby amended to read as follows:

"Power is hereby conferred upon the Congress of the United States to pass laws and to make or provide for the making of such rules and regulations of both a civil and criminal nature, and provide punishment therefor, as in its judgment may be necessary for the administration, control and protection of such lands as have been acquired or may hereafter be acquired under the provisions of this Act."

Cooper's Statutes of South Carolina, 1795, Vol. V, p. 259, provided:

"WHEREAS, the late Secretary of State of the United States, in his letter to the late Governor of this State, did request that he would take proper measures for obtaining the consent of the Legislature of this State, that the United States should purchase a quantity of land in this State, whereon arsenals and magazines might be erected:

I. *Be it therefore enacted* by the honorable the Senate and House of Representatives, now met and sitting in General Assembly, and by the authority of the same, That the United States, or such person or persons as may be by them authorized, shall have a right to purchase, in any part of this State that may be thought most

eligible, the fee simple of any quantity of land, not exceeding two thousand acres, for the purpose of erecting arsenals and magazines thereon, agreeably to the Act of Congress entitled "An Act to provide for the erecting and repairing of arsenals and magazines, and for other purposes," passed on the second day of April, in the year of our Lord one thousand seven hundred and ninety-four.

II. *And be it further enacted* by the authority aforesaid, That if the person or persons whose land may be chosen for the above mentioned purpose, should not be disposed to sell the same, or if the persons appointed to make the purchase should not be able to agree upon terms with such owner or owners of the said land, the same shall be valued upon oath by a majority of persons to be appointed by the Court of Equity or Court of Common Pleas of this State for that purpose; and the land shall be vested in the United States, upon their paying the amount of such valuation to the owner or owners of such land.

III. *And be it further enacted* by the authority aforesaid, That the said land, when purchased, and every person and officer residing or employed thereon, whether in the service of the United States or not, shall be subject and liable to the government of this State, and the jurisdiction, laws and authority thereof, in the same manner as if this Act had never been passed; and that the United States shall exercise no more authority or power, within the limits of

the said land, than they might have done previous to the passing of this Act, or than may be necessary for the building, repairing, or internal government, of the arsenals and magazines thereon to be erected, and the regulation and management of the same, and of the officers and persons by them to be employed in or about the same: Provided always, that the said land shall for ever be exempt from any taxes to be paid to this State."

VI. ACQUISITION HISTORY OF THE PARCELS OWNED AT THE OAKLAND ARMY TERMINAL.

Parcel No.	*Acreage*	*Date of acquisition of title*
A-114	72	1 15 41—R. 368, 639; *City of Oakland v. United States*, CA 9th, 1942, 124 F. 2d 959, cert. denied 316 U.S. 679.
A-114	182.85 acres (incl. portion of 72-acre parcel acquired 1/15/41	11 14 46—Deed to 199.92 acres (incl. the 182.85 acre tract) dated 7 23 43 (R. 368) was not accepted by the government until the execution of a stipulation dated 11 14 46, filed 12 9 46, in *United States v. 72 acres*, U.S. Dist. Ct., N.D. of Calif., S.D., #21758 (R. 639).
A-114	123.33	9 11 53 — Final Judgment, entered 9 11 53 in *United States v. 72 acres*, U.S. Dist. Ct., N.D. of Calif., S.D., #21758. (R. 639).
B-206	14.64	9 3 42—R. 368, 639; Declaration of Taking, *United States v. Certain Parcels*, U.S. Dist. Ct., N.D. of Calif., S.D., #21930L.
B-209	27.47	4 22 41—R. 368; Deed dated April 29, 1941, recorded Book 4017, p. 485, Alameda County Recorder's Office.
B-210	76.51	3 2 42—R. 368, 639; Deed dated March 2, 1942, recorded Book 4189, p. 197, Alameda County Recorder's Office.

Parcel No.	*Acreage*	*Date of acquisition of title*
B-211	101.53	4 22 41—R. 368; Deed dated April 22, 1941, recorded Book 4017, p. 485, Alameda County Recorder's Office.
B-220	27.75	10 16 47—R. 368, 639; Declaration of Taking, *United States* v. *Certain Parcels*, U.S. Dist. Ct., N.D. of Calif., S.D., #21930L.
B-222	5.47	10 16 47—R. 368, 639; Declaration of Taking: *United States* v. *Certain Parcels*, U.S. Dist. Ct., N.D. of Calif., S.D., #21930L.
C-300	.904	1 18 44—R. 368, 639; Declaration of Taking, *United States* v. *3,367 acres*, U.S. Dist. Ct., N.D. of Calif., S.D., #230995.
C-302	.158	1 18 44—R. 368, 639; Declaration of Taking, *United States* v. *3,367 acres*, U.S. Dist. Ct., N.D. of Calif., S.D., #230995.
C-305	.0969	1 18 44—R. 368, 639; Declaration of Taking, *United States* v. *3,367 acres*, U.S. Dist. Ct., N.D. of Calif., S.D., #230995.
C-306	4.57	5 5 41—R. 368, 639; Deed dated May 5, 1941, recorded Book 4076, p. 31, Alameda County Recorder's Office.

VII. STATE MILK STABILIZATION STATUTES.

Alabama Code, 1955 Revision, Title 22, Secs. 205 et seq.

Arkansas Stats. 1955, Secs. 70-701 et seq.

California Agricultural Code, Division 6, Chapter 17, Sections 4200 through 4420, inc.

Connecticut General Statutes 1958 Revision, Title 22, Chapter 431, Secs. 205 et seq.

Florida Statutes, 1957 Revision, Chapter 501, Secs. 501.01 et seq.

Georgia Code Annotated, 1957 Revision, Title 42, Secs. 42.524 et seq.

Louisiana West's Statutes Annotated, 1958 Revision, Title 40, Secs. 940.1 et seq.

Maine Revised Statutes, 1957 Supplement, Chapter 33, Secs. 1 et seq.

Massachusetts Annotated Laws, 1958, Chapter 94A, Secs. 1 et seq.

Montana Revised Code, 1957 Supplement, Title 27, Secs. 27-400 et seq.

Nevada Revised Statutes, 1958, Secs. 584.350 et seq.

New Hampshire Revised Statutes, 1957, Title XIV, Chapter 183; Secs. 183.1 et seq.

New Jersey Annotated Statutes, 1958, Title 4, Secs. 4.12A-1 et seq.

New York Consolidated Laws Annotated, Book 21, 1958 Revision, Secs. 253 et seq.

North Carolina General Statutes, 1957 Revision, Article 28B, Secs. 106.266.6 et seq.

Oregon Laws, 1961, Ch. 529.

South Carolina Statutes At Large, 1961, Act No. 319, page 512.

Pennsylvania Purdom's Annotated Statutes, 1958 Revision, Title 31, Secs. 700J-103 et seq.

Rhode Island General Laws, 1958, Title 21, Secs. 21-4-1 et seq.

Vermont Statutes Annotated, 1948, Title 6, Secs. 2502 et seq.

Virginia Code, 1958, Title 3, Secs. 3-346 et seq.

Washington Session Laws, 1961, Ch. 298.

VIII. LEGISLATIVE HISTORY OF THE RELEVANT PROVISIONS OF 10 U.S.C. 2304

Section	*Source*	*Comment*
"2304(a) Purchases of and contracts for property or services covered by this chapter shall be made by formal advertising. However, the head of an agency may negotiate such a purchase or contract, if—"	Revised Statutes, Sec. 3709; Sec. 10, Act of March 2, 1861, 12 Stat. 214, 220	
"2304(a)(1) it is determined that such action is necessary in the public interest during a national emergency declared by Congress or the President;"	Act of June 28, 1940, 54 Stat. 676; Act of July 2, 1940, 54 Stat. 712; First War Powers Act, 55 Stat. 839	
"2304(a)(2) the public exigency will not permit the delay incident to advertising;"	Revised Statutes, Sec. 3709; Sec. 10, Act of March 2, 1861, 12 Stat. 214, 220	R.S. 3709 provided that advertising was required "when the public exigencies do not require the immediate delivery of the articles or performance of the services" but that "when immediate delivery or performance is required by the public exigency, the articles or services required may be procured by an open purchase or contract, at the places and in the manner in which such articles are usually bought and sold, or such services engaged, between individuals."
"2304(a)(3) the aggregate amount involved is not more than $2,500;"	Act of June 12, 1906, 34 Stat. 258; Act of March 2, 1907, 34 Stat. 1193	

Section	*Source*	*Comment*
"2304 (a) (4) the purchase or contract is for personal or professional services;"	Revised Statutes, Sec. 3709; Act of March 2, 1861, 12 Stat. 214, 220	
"2304 (a) (5) the purchase or contract is for any service by a university, college, or other educational institution;"	Act of August 13, 1946, 60 Stat. 1057	
"2304 (a) (6) the purchase or contract is for property or services to be procured and used outside the United States and the Territories, Commonwealths, and possessions;"	Revised Statutes, Sec. 3721; Act of March 3, 1845, 5 Stat. 794	
"2304 (a) (7) the purchase or contract is for medicine or medical supplies;"	Revised Statutes, Sec. 3721; Section 2(k), Act of October 10, 1940, 54 Stat. 1110	
"2304 (a) (8) the purchase or contract is for property for authorized resale;"		"Purchase for ships' stores, and commissaries, and other similar activities are generally not made by specification, but by brand names, with a view toward accommodating the brand preferences of persons authorized to use such facilities. Therefore the power to negotiate is required because of the proprietary nature of the articles." House Report, No. 109, 80th Congress, 1st Sess., p. 8.

Section	*Source*	*Comment*
"2304(a)(9) the purchase or contract is for perishable or nonperishable subsistence supplies;" The words "or nonperishable" were added by the Act of August 28, 1958, 72 Stat. 966, 967.	Revised Statutes, Sec. 3721; Act of March 3, 1845, 5 Stat. 794	R.S. 3721 which authorized the Secretary of the Navy to purchase butter or cheese without advertisement, was enlarged to cover all perishable supplies purchased by all services.
"2304(a)(10) the purchase or contract is for property or services for which it is impracticable to obtain competition;"	Act of March 2, 1901, 31 Stat. 905	Act of March 2, 1901, 31 Stat. 895, 905, authorized Quartermaster's Department, United States Army, to purchase supplies without advertisement "where it is impracticable to secure competition."
"2304(a)(11) the purchase or contract is for property or services that he determines to be for experimental, development, or research work, or for making or furnishing property for experiment, test, development, or research;".	Act of August 1, 1946, 60 Stat. 779, 780	
"2304(a)(12) the purchase is for property or services whose procurement he determines should not be publicly disclosed because of their character, ingredients, or components;"	Act of May 11, 1908, 35 Stat. 125; Act of May 15, 1936, 49 Stat. 1277; Act of July 13, 1939, 53 Stat. 1000	

Section	Source	Comment
"2304 (a) (13) the purchase or contract is for equipment that he determines to be technical equipment whose standardization and the interchangeability of whose parts are necessary in the public interest and whose procurement by negotiation is necessary to assure that standardization and interchangeability;"		"By reason of the growing use of mechanized equipment and the growing diversity of makes of equipment capable of performing identical operations, the maintenance of stores of replacement parts is becoming more and more burdensome and uneconomical. The agencies should be empowered to hold within reasonable bounds the number of diverse makes of machines or other items used for a specific purpose." House Report, No. 109, 80th Congress, 1st Sess., p. 31.
"2304 (a) (14) the purchase or contract is for technical or special property that he determines to require a substantial initial investment or an extended period of preparation for manufacture, and for which he determines that formal advertising and competitive bidding might require duplication of investment or preparation already made or would unduly delay the procurement of that property; or"		This subparagraph enables the Departments to "maintain necessary standards of quality control in a way not possible when procurement is by bid and award pursuant to general specifications." House Report, No. 109, 80th Congress, 1st Sess., p. 12.

Section	Source	Comment
"2304(a)(15) the purchase or contract is for property or services for which he determines that the bid prices received after formal advertising are unreasonable as to all or part of the requirements, or were not independently reached in open competition, and for which (A) he has notified each responsible bidder of intention to negotiate and given him reasonable opportunity to negotiate; (B) the negotiated price is lower than the lowest rejected bid of any responsible bidder, as determined by the head of the agency; and (C) the negotiated price is the lowest negotiated price offered by any responsible supplier;"		"It all too frequently occurs that bidders quote identical prices, or that bids in a particular industry fluctuate so as to appear to permit distribution of the Government's business in accordance with a formula agreed upon by the bidders, or that the number of bids received appears to have been restricted by prearrangement amongst the possible bidders. "It is necessary in such situations that the agencies have the power to inquire into the reasons why they are not securing the benefits of competition. That can only be done if they are granted the power to negotiate for the purchase of supplies or services where they believe that the bid prices are not reasonable or have not been arrived at independently." House Report, No. 109, 80th Congress, 1st Sess., p. 31

Section	*Source*	*Comment*
"2304(a)(16) he determines that (A) it is in the interest of national defense to have a plant, mine, or other facility, or a producer, manufacturer, or other supplier, available for furnishing property or services in case of a national emergency; or (B) the interest of industrial mobilization in case of such an emergency, or the interest of national defense in maintaining active engineering, research, and development, would otherwise be subserved; or"	Act of June 16, 1938, 52 Stat 707	
"2304(a)(17) negotiation of the purchase or contract is otherwise authorized by law."		"This exclusion preserves the effect of exceptions created by temporary legislation and by statutes not repealed by Section 11 of this Statute. Sec. 11, Armed Services Procurement Act of 1947, 62 Stat 21]." House Report, No. 109, 80th Congress, 1st Sess., p. 32